Supreme Court, U.S.
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No. 06-

IN THE

Supreme Court of the United States

ROBERTA A. DELSON, PH.D,

Petitioner,

v.

MARIA CINO,
Acting Secretary of the Department of Transportation,
an executive agency of the federal government,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Second Circuit in *Delson v. Mineta*, 2005 WL 1712856 (2d Cir. 2005), overlooks the clear language of the ADA and its legislative history, disregards EEOC's published guidelines, and conflicts with the Seventh, Eighth, Ninth and Tenth Circuit Courts of Appeal that recognize a cause of action under the ADA for the unauthorized breach of an employee's medical privacy by unlawful inquiries outside strict exceptions. *Delson* presents this conflict although the Second Circuit had recognized a cause of action for medical privacy in *Conroy v. New York State Department of Correctional Services*, 333 F.3d 88 (2d Cir. 2003) before *Delson*.

The conflict presented by *Delson* promotes confusion and disharmony among the federal courts charged with administering the remedies available to individuals with disabilities. By exercising jurisdiction in this case, this Court can eliminate the conflict presented by the Second Circuit regarding the limits imposed on access to confidential medical data, as well as provide rationality, certainty and uniformity to this area of medical inquiries. Review should also be granted because this case involves questions of exceptional importance that impact on the nation's goals to assure individuals with disabilities self-reliance, economic self-sufficiency, and equal opportunity to participate in and contribute to society.

Seven questions are presented:

1. Does the ADA recognize a private cause of action against an employer for an unlawful medical inquiry outside strict exceptions?

2. May an employee hold back medical information where the employer refuses to treat the information as confidential medical records consistent with the ADA?

3. Is an employee's failure to respond to a request for medical information excused by unlawful inquiries requiring disclosure that is too broad or more intrusive than necessary?

4. Is an employer's refusal to consider accommodations that are obvious for the employee's known disability and the employer's reliance on impermissible inquiries to justify this decision an unlawful discriminatory practice?

5. Once a finding on the issue of unlawful inquiry has been made, is the question of reasonable accommodation a separate one that should be considered and resolved in the assessment of damages?

6. Once a finding on the issue of unlawful inquiry has been made, must the employer bear the cost of its "lost opportunity" to determine whether, with reasonable accommodations, the employee could have remained otherwise qualified for the position?

7. Or, in the alternative, once a finding on the issue of unlawful inquiry has been made, does the burden shift to the employer to plead and prove that no reasonable accommodation exists that would render the employee an otherwise qualified individual for the position?

LIST OF INTERESTED PARTIES

The following persons were parties below and have an interest in the outcome of this case.

Roberta A. Delson, Ph.D

Maria Cino, Acting Secretary of the Department of Transportation, has succeeded Norman Mineta, former Secretary of the Department of Transportation, an executive agency of the federal government

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OPINION BELOW

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STATEMENT OF JURISDICTION

Petitioner seeks review of the Second Circuit's summary order that was rendered on July 22, 2005. The Petition for Panel Rehearing with Suggestion for Rehearing En Banc was denied on May 5, 2006. See Appendix C. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Americans with Disabilities Act of 1990, 42 U.S.C.A. § 12111 et seq.

Title 42 United States Code, Section 12112(d)(1)

Medical Examinations and Inquiries

The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.

The provisions of 29 U.S.C. § 791(g); 42 U.S.C. §§ 12112(d)(2), (d)(3)(B), (d)(3)(B)(i), (d)(4)(A), (d)(4)(B) and (d)(4)(C); 42 U.S.C. § 12116; 29 C.F.R. § 1614.203; 29 C.F.R. §§ 1630.14(c)(1) and (c)(1)(i), are lengthy and, therefore, set out in Appendix D, pursuant to Supreme Court Rule 14.1(f).

STATEMENT OF THE CASE

Roberta M. Delson, Ph.D., a former full time tenured Associate Professor at the United States Merchant Marine Academy (hereinafter the "Academy") suffers fatigue due to multiple sclerosis ("MS"), a covered disability within the meaning of the Rehabilitation Act of 1973, as amended (hereinafter the "Act"). 29 U.S.C.A. § 701, *et seq.* As an employee with MS-related fatigue, Dr. Delson was, and still is, able to perform a full time job when given a schedule that requires her to be at the workplace no more than three days a week, and permits her to work from home the remaining two days. She would have been able to perform the duties of her position, without a modified schedule, were it not for fatigue.

First Term AY98-99, Dr. Delson was assigned courses that each met four-days a week, in disregard of a longstanding accommodation of a three-day teaching schedule established five years earlier. Without a modified schedule, she had to request an unpaid leave of absence for the term. The trial court found that the leave was a reasonable accommodation. Thus, Dr. Delson was an individual with a disability "otherwise" qualified, since she could perform the essential functions of the job when she returned from leave for the second term. Her schedule called for courses that each met twice a week.

However, Warren Mazek, the Dean of Academic Affairs (hereinafter the "Dean"), refused to grant the First Term leave unless Dr. Delson disclosed her complete medical record in response to unnecessarily intrusive and overbroad medical inquiries, dated May 15, 1998. The Dean also insisted that Dr. Delson authorize the disclosure of this confidential information to the Dean himself, as well as to other supervisors and managers. The Dean told Dr. Delson that no accommodation would be considered unless she complied.

The inquiries, dated May 15, 1998, are far-ranging and ask for unnecessarily intrusive details about Dr. Delson's physical and mental health and medical history in general, such as:

> Current and complete medical evaluation outlining her present health, including, but not limited to, her present neurological status (multiple sclerosis) and its effect on her entire physical and mental health in general
>
> Clinical findings from the most recent medical evaluation, including the results of a complete neurological examination, laboratory tests, x-rays, MRIs, and other special evaluations or diagnostic procedures
>
> History of her medical condition, including references to findings from previous medical examinations, treatments and responses to treatments
>
> Prognosis and plans for future treatment in general

> Medications Dr. Delson used for any medical condition and her history of and compliance with taking these drugs
>
> Any drug side effects, drug reactions, drug-to-drug interactions, or any other drug related medical complications, if any, that may have an impact on safe, efficient and effective job performance

The inquiry on its face, and in its application, constitutes an impermissible medical inquiry prohibited by the Act. Dr. Delson, nevertheless, complied in good faith with the Dean's request, in that her neurologist, Stephen S. Kamin, Associate Director, Bernard W. Gimbel Multiple Sclerosis Comprehensive Care Center, Holy Name Hospital, Teaneck, New Jersey, provided further documentation and reaffirmed his recommendations and findings stated in four previous reports with sufficiently reasonable detail to identify Dr. Delson's functional limitation and the accommodation she needed.

Moreover, Dr. Delson in good faith also agreed to produce her complete medical record as long as it was kept confidential and used only by a qualified medical expert designated by the Academy to evaluate and inform the Dean and other relevant supervisors and managers, such as the Head of the Humanities Department, who may need to know, only about the "necessary restrictions on the duties of the position" and the "necessary accommodations." Dr. Delson was not required to respond to disability related-inquiries under which she would be compelled to waive her right of privacy guaranteed under the Act. The Dean, however, rejected her request and refused to treat the medical records as confidential.

At trial, the Dean testified:

> THE COURT: Whether it's necessary or not, is it your position that your letters require Professor Delson to sign an authorization that would allow you to look at the medical records?
>
> THE WITNESS: It would allow me to but I don't think it was necessary. * * * What I'd need to know is in our physician's judgment she was capable of doing and how we might accommodate that.

On September 4, 1998, the Dean revoked the leave, retroactively, because Dr. Delson would not waive her right of privacy and held back the confidential medical information. The Dean suspended Dr. Delson for the Second Term, and she was fired on January 15, 1999, because of her noncompliance with the inquiries and her absence First Term. Dr. Delson was unable to return to work because the Academy failed to restore a modified schedule once leave was revoked, retroactively, two months before she was due to return for Second Term on November 9, 1998.

The Academy's assertion that it fired Dr. Delson based on her noncompliance with the inquiries, and her absence First Term, amounts to discharge solely because of her disability. Refusing to consider accommodations that were obvious for her known disability and relying on impermissible inquiries to justify this decision is disability discrimination. Thus, the Academy must bear the cost of its "lost opportunity" to determine whether, with reasonable accommodations that existed, Dr. Delson could have remained "otherwise" qualified for the position of employment.

REASONS FOR GRANTING THE PETITION

A. *Delson* permits exactly the kind of compelled disclosure of disability-related medical data that Congress intended to curb.

One purpose of the Act[1] is to ensure that truly disabled, but genuinely capable individuals will not face discrimination because of stereotypes about the insurmountability of their disabilities. *Parker v. Sony Pictures Entertainment, Inc.*, 260 F.3d 100, 113 (2d Cir. 2001). Too often, unnecessary information about employee disabilities comes into the hands of employers and may create:

> Barriers which prevent qualified individuals with disabilities from enjoying the same employment opportunities that are available to persons without disabilities.

[1] Dr. Delson invoked section 501 of the Rehabilitation Act, 29 U.S.C. § 791, in her complaint. The standards for determining whether there has been a violation of section 501 are the same as those applied under Title I of the Americans with Disabilities Act ("ADA"). 29 U.S.C. § 791(g); 42 U.S.C.A. § 12111 et seq., 29 C.F.R. § 1630.1(c).

EEOC Interpretive Guidance on Qualifications, Standards, Tests, Other Selection Criteria, 29 C.F.R., App. § 1630.10.

Legislative "Findings" at the outset of the ADA stress the adverse impact of stereotypes on opportunities for persons with disabilities:

> individuals with disabilities . . . have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to society . . . 42 U.S.C. § 12101(a)(7).

As with every question of statutory interpretation, we start with the language of the statute. The preventive approach to combating discrimination is embedded in various provisions of the ADA that impose strict limits on access to employee medical data to prevent its potential harm as a basis for workplace discrimination. 42 U.S.C.A. §§ 12101(d)(1), 12112(d)(3)(B) and (d)(4)(C).

The ADA prohibition against discrimination specifically includes medical inquiries and examinations. ADA, 42 U.S.C. 12112(d)(1). Subsection (d)(1) states that medical inquiries may not be used to discriminate and directs courts to treat medical examinations and inquiries as unlawful employment discrimination.

The ADA creates limited exceptions to the general prohibition on medical inquiries. One exception of the ADA provides:

> A[n employer] shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity. 42 U.S.C. § 12112(d)(4)(A).

Thus, an employee's failure to respond to a request for medical information is excused by unlawful medical inquiries

requiring disclosure that is too broad or more intrusive than necessary. 42 U.S.C. § 12112 (d) (4) (A) and (d) (4) (B). Employers cannot require employees to respond to medical inquiries unless the inquiries are shown to be "job-related and justified by business necessity." 42 U.S.C. § 12112 (d) (4) (A) and (d) (4) (B); E.E.O.C. Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA), 8 FEP (BNA) 405:7701 and 7703, n. 14, citing S. Rep. No. 101-116 at 39-40 (1989); H.R. Rep. No. 101-485, pt. 2, at 75 (1990) [EEOC Enforcement Guidance on Disability Related Inquiries].[2] The ADA "entitles employees (of covered institutions) to maintain a special zone of privacy from their employers concerning their health and medical conditions." *Transport Workers Union of America, Local 100, AFL-CIO v. New York City Transit Authority*, 341 F.Supp.2d 432, 437 (S.D.N.Y. 2004).

In addition, the ADA requires that medical information obtained from medical inquires and examinations must be treated as confidential. 42 U.S.C. §§12112(d)(3)(B) and (d)(4)(C); 29 C.F.R. §1630.14(b)-(d). This restriction is of key importance to people with disabilities. Employees in responding to requests for medical information outside strict exceptions are not obligated to waive or bargain away their right of privacy. 42 U.S.C. § 12112 (d)(3)(B), (d)(4)(B) and (d)(4)(C). The employee with a disability may hold back medical information where the employer refuses to treat it as confidential medical records consistent with the ADA. 42 U.S.C. §§12112(d) (1), (d) (3) (B) and (d)(4)(C); 29 C.F.R. §1630.14(c).

Every employer must comply with the strict regulations that protect the confidentiality of medical records under the ADA. See, 42 U.S.C. § 12112(d)(3)(B) and d(4)(C) and 29 C.F.R. 1630.14(c); they must collect and maintain information

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[2] Both houses of Congress that crafted the ADA determined that: "An inquiry or medical examination that is not job-related serves no legitimate employer purpose, but simply serves to stigmatize the person with a disability." H.R. Rep. 101-485 (II) at 75 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 358; H.R. Rep. 101-485 (III) at 44 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 467; S. Rep. 101-116, at 40 (1989) cited in Disability-Related Inquiries, *supra*, 8 FEP (BNA) 405:7703, n. 14.

regarding the medical condition or history of the employee on separate forms and in separate medical files and treat them as a confidential medical record. 42 U.S.C.A. §§12112(d)(3)(B) and (d)(4)(C); 29 C.F.R. §1630.14(b)-(d).

The ADA specifically prohibits the disclosure of medical information collected, except in certain limited situations. 42 U.S.C.A. 12112(d)(3)(B), (d)(4)(B) and (d)(4)(C). The ADA is remedial legislation and should therefore be given a liberal interpretation; but for the same reason exceptions from its sweep should be construed narrowly and limited so that the major policy underlying the general rule is not defeated. *Israel-British Bank (London, Ltd. v. Federal Deposit Ins.*, 536 F.2d 509, 513 (2d Cir. 1976); *Nussle v. Willette*, 224 F.3d 95, 99 (2nd Cir. 2000); *Signal Capital Corp. v. Eastern Marine Management, Inc.*, 899 F.Supp. 1169, 1170 (S.D.N.Y. 1995).

Supervisors and managers involved in the accommodation process who need to know may be informed only of "the necessary restriction on the work or duties of the employee and of necessary accommodations." 42 U.S.C.A. 12112(d)(3)(B)(i), (d)(4)(B) and (d)(4)(C); 29 C.F.R. § 1630.14(c)(i). The ADA makes no exception that would require Dr. Delson to disclose the complete medical record of her health and medical history in general to a supervisor or manager. Where a general rule is established by statute with exceptions, the court will not curtail the former nor add to the latter by implication, and it is the general rule that an express exception excludes all others. *Israel-British Bank (London, Ltd. v. Federal Deposit Ins., supra*, 536 F.2d at 513; *Signal Capital Corp. v. Eastern Maine Management, Inc., supra*, 899 F.Supp. at 1170.

Dr. Delson reasonably expected that the documentation about her health and medical history in general would be kept confidential and only viewed by the Academy's medical expert for evaluation. 42 U.S.C. § 12112 (d) (1), (d) (3) (B), (d) (4) (A), (d) (4) (B) and (d) (4) (C); 29 C.F.R. § 1630.14(c)(i). A disabled employee may not have the same expectations of medical privacy as others once she or he requests reasonable accommodation. But even an employee with a disability is not required to respond to disability related inquiries under which the employee would waive her or his right of privacy

guaranteed under the ADA. 42 U.S.C. § 12112 (d) (1), (d) (3) (B), (d) (4) (A), (d) (4) (B) and (d) (4) (C); 29 C.F.R. § 1630.14(c)(i).

Dr. Delson in good faith engaged in an interactive process. She agreed to produce her complete medical record as long as it was kept confidential and was used only by a qualified medical expert designated by the Academy. The expert would evaluate, and, then, inform the Dean and other relevant supervisors and managers who need to know only of the necessary restrictions on the work or duties of the position and of the accommodations needed consistent with the ADA (A. 1606-1607 and 1610-1611). 42 U.S.C. 12112(d)(3)(B)(i) and (d)(4)(C); 29 C.F.R. 1630.14(c)(1)(i).

The Dean denied Dr. Delson's request. He continued to insist that she release her complete medical record and authorize its disclosure to the Dean and other supervisors and managers. The Dean refused to budge and derailed the interactive process.

The Academy's asserted interest easily could have been served by requiring medical documentation for inspection by a health care provider with expertise to evaluate and render an opinion. Requiring employees to provide confidential information about their health and medical history in general to non-medical personnel provides no assurance that these employees are trained to make determinations based on that documentation. Quite the contrary, providing a medical record to a supervisor or manager is more likely to have the effect of coloring judgment based on stereotypes or misconceptions, the very harm the ADA was enacted to prevent.

B. The questions asked are unrelated to the disability of MS-related fatigue for which Dr. Delson requested accommodation, and, as such, the scope of the inquiries exceeds the legitimate needs of the Academy.

Delson fails to make an individualized assessment of the inquiries asked and allows the employer to rely on superficial assertions of business need without having to explore effective, less intrusive alternatives, thereby exposing the employee to discrimination. The inquiries asked were triggered to aid in the reasonable accommodation process. The leave request was

not an invitation for far-ranging inquiries outside strict statutory exceptions.

> [I]n most situations an employer cannot request a person's complete medical records because they are likely to contain information unrelated to the disability at issue and the need for accommodation.

EEOC Enforcement Guideline on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, 8 FEP (BNA) 405:7608. [Hereinafter EEOC Enforcement Guidance on Reasonable Accommodation]. See, also, EEOC Guidance on Disability-Related Inquiries, *supra*, 8 FEP 405:7715.

It is both the likelihood that the inquiries require disclosure of disabilities or perceived disabilities unrelated to the accommodation requested and the absolute lack of a legitimate need for such information that renders the inquiries in violation of the ADA. E.E.O.C. Guidance: Disability-Related Inquiries, *supra*, 8 FEP (BNA) 405:7701 and 7703, n. 14. The ADA requires that employers use methods that serve legitimate operational business needs without trammeling the rights of workers. *Delson*, however, creates a safe harbor for employers who neglect to explore effective, less intrusive alternatives, and thereby risk causing widespread discrimination.

Dr. Delson did not affirmatively place her general physical or mental health or medical history in issue when she requested an unpaid leave. The scope of her request for an accommodation was based on fatigue, precisely the disabling source of her admitted functional limitation. This does not permit wholesale discovery of information regarding unrelated diagnoses, illnesses, disabilities, tests, treatments, medications,[3] medical history or her current physical and

[3] The Academy's operational business needs are not served by questions about every prescription drug medication Dr. Delson takes. Requiring an employee to disclose all prescription drug medication she or he was taking is a prohibited inquiry unless safety is a genuine business necessity. Enforcement Guidance: Disability-Related Inquiries, *supra*, 8 FEP (BNA) 405:7712-16; Enforcment Guidance: Disability-Related Inquiries, *supra*, 8 FEP (BNA) 405:7712-13; *Roe v. Cheyenne Mountain Conference Resort*, 124 F.3d 1221, 1229 (10th Cir. 1997).

mental health in general. Although Dr. Delson may have other neurological signs and symptoms these have not caused a significant disability. She would still be able to perform all the duties of her position without a modified schedule, were it not for fatigue. Requiring disclosure of her complete medical record would likely elicit disclosure of disabilities or perceived disabilities unrelated to the accommodation needed, but serve no legitimate purpose of the Academy.

A disability-related inquiry is lawful only if it is shown to be "job-related and consistent with business necessity." U.S.C. §12112(d) (4) (A) and (d) (4) (B); 29 C.F.R. §1630.14(c). This is an affirmative defense as to which the employer has the burden to plead and prove that its asserted business interest is served by the intrusion into the employee's privacy. *Conroy v. New York State Department of Correctional Services*, 333 F.3d 88, 97-98 (2d Cir. 2003).

The employer is required to make a two-part showing. First, the business necessity must be vital to the business. Second, the inquiry must genuinely serve the asserted business necessity and it must be shown to be no broader or more intrusive than necessary. *Conroy, supra*, 333 F.3d at 97-98 and 101 citing *Cripe v. City of San Jose*, 261 F.3d 877, 890 (9th Cir. 2001); *Morton v. UPS, Inc.*, 272 F.3d 1249, 1257 and 1260 (9th Cir. 2001), *cert. denied*, 535 U.S. 1054, 122 S. Ct. 1910, 152 L.Ed.2d 821 (2002) (referring to "the stringent elements" of the business necessity defense).

The Academy has proven neither a specific business need to demand Dr. Delson's complete medical record, nor a lack of less intrusive alternatives. An "[e]mployer" can request information pertaining only to the disability that requires a reasonable accommodation." EEOC Enforcement Guideline on Reasonable Accommodation *supra*, 8 FEP 405:7608-7609; [EEOC Enforcement Guideline: Disability-Related Inquiries, *supra*, 8 FEP (BNA) 405:7713, n. 53. "The employer, in response to a request for reasonable accommodation, cannot ask for documentation that is unrelated to determining the existence

of a disability and the necessity for an accommodation." EEOC Enforcement Guideline on Reasonable Accommodation, *supra*, 8 FEP (BNA) 405:7608-7709. "If an individual has more than one disability, an employer can request information pertaining only to the disability for which the employee is requesting an accommodation." EEOC Enforcement Guideline: Disability-Related Inquiries, *supra*, 8 FEP 405:7713, n. 53. See, also, EEOC Enforcement Guideline on Reasonable Accommodation *supra*, 8 FEP 405:7608-7609.

"The business necessity standard is quite high, and is not [to be] confused with mere expediency." *Conroy v. New York State Department of Correctional Services*, *supra*, 333 F.3d at 97-98 and 101 citing *Cripe v. City of San Jose*, *supra*, 261 F.3d at 890 (9th Cir. 2001); *Morton v. UPS, Inc.*, *supra*, 272 F.3d 1249, 1257 and 1260. Interpretation of the "business necessity" standard such that the employer has the burden of proving less intrusive means are unavailable or too difficult to implement, is central to preventing disability discrimination before it takes place. *Conroy v. New York State Department of Correctional Services*, *supra*, 333 F.3d at 97-98 and 101 citing *Cripe v. City of San Jose* 261 F.3d 877, 890 (9th Cir. 2001); *Morton v. UPS, Inc.*, 272 F.3d 1249, 1257 and 1260 (9th Cir. 2001), cert. denied, 122 S. Ct. 1910 (2002).

Congress enacted the ADA because "'society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairments.'" *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999) (quoting *School Bd. Of Nassau County v. Arline*, 480 U.S. 273, 284 (1987)). Only by strictly limiting employer access to information about employee disabilities to data truly necessary to permit safe and efficient employer operations can the anti-discrimination goals of the ADA be realized. Guidance: Disability-Related Inquiries, *supra*, 8 FEP (BNA) 405:7701 and 7703, n. 14, citing S. Rep. No. 101-116 at 39-40 (1989); H.R. Rep. No. 101-485, pt. 2, at 75 (1990). It would seem that these observations apply here.

Since 1993, when Dr. Delson first requested an accommodation, copies of the medical information collected were incorrectly distributed and held by both of her supervisors - i.e., the Dean and Jane Brickman, Head of the Humanities Department (hereinafter "Dr. Brickman"). The content was discussed and examined by each of them. As a result, Dr. Delson was repeatedly subjected to their ridicule and repeated inquiries based on stereotypic assumptions.[4]

The trial court simply characterized the conduct of Dr. Brickman, Dr. Delson's immediate supervisor, as being "insensitive to [Dr. Delson's] condition.." At trial, Dr. Brickman answered YES, in response to the question: Do you believe that Dr. Delson is in remission and appears to be in good health?

Dr. Brickman testified:

Q. What was the basis of that belief that she was possibly in remission?

A. Well, she appeared very strong and vigorous.

* * *

Q. What period of time was this?

A. I guess this was for most of the time that she and I were together in that department.

Dr. Delson's condition is precisely the type of case that led the United States Supreme Court to find a right of confidentiality of private sector employees in their employer-held medical records in the case of *Detroit Edison v. N.L.R.B.*, 440 U.S. 301, 318, 99 S.Ct. 1123, 1133, 59 L.Ed.2d 333 (1979). In upholding the utility's refusal to disclose to their union psychological test results without first receiving the

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[4] From the outset, Dr. Delson was subjected to intrusive inquiries that were not job related and without business necessity. Dr. Brickman, made specific reference to detailed medical information regarding a particular medication listed in Dr. Kamin's report of September 8, 1993. Dr. Brickman told Dr.Delson that she understood Dr. Delson was taking a stimulant that she believed had changed Dr. Delson's personality. Dr. Brickman also questioned why Dr. Delson was not taking Betaseron. In another instance, Dr. Brickman was skeptical about Dr. Delson's handicap driver's permit and claimed that doctors freely supply them to patients just for the asking without cause. Dr. Brickman also asked whether Dr. Delslon wore slacks because her legs were [illegible]hied .

employee's written authorization, the Court stated: "The sensitivity of any human being to disclosure of information that may be taken to bear on her or his basic competence is sufficiently well known to be an appropriate subject of judicial notice." Id. at 318-19, 99 S.Ct. at 1133. Dr. Delson's also is the type of case that led Congress to codify the right of confidentiality in the ADA.

The Academy initially received two reports from Dr. Delson's neurologist, Stephen S. Kamin, dated May 26, 1993, and September 8, 1993, respectively, asking for an accommodation of a modified schedule. The Dean treated Dr. Kamin's submission as reasonable medical documentation that was sufficiently detailed to substantiate an ADA disability, the restriction it imposed on the duties of the position, and the necessity of a modified schedule that required Dr. Delson's presence at the Academy no more than three days a week and permitted her to work from home with no assignments that required her to be on campus the remaining two days. There was no indication that the accommodation was denied or the medical submission lacked sufficient detail.

Dr. Kamin reported that Dr. Delson has MS and her major symptom is overwhelming fatigue and a decrease in stamina. Dr. Kamin explained that if she overextends herself, fatigue would exacerbate her symptoms and place her health and safety at risk. Dr. Kamin pointed out that Dr. Delson required rest periods and should schedule activities of the day when her energy level is highest, so that tasks may be completed and destinations reached safely.

Dr. Kamin also specifically confirmed Dr. Delson's need for an accommodation that required Dr. Delson's presence no more than three days a week at the Academy, stating:

> * * * [I]t is clear that Dr. Delson's severe fatigue does impose limitations on the scheduling of her activities. Because of her reduced stamina, a schedule of three days a week of teaching is medically warranted. * * *

From this time on, the Academy assigned Dr. Delson a modified schedule that conformed to the accommodation requested until First Term AY98-99. She was excused from committees, which would have required her presence at the

Academy more than three days a week, and she was consistently given a three day teaching schedule, with classes between 10:00 a.m. and 3:00 p.m., and no classes after 2:00 p.m. on Fridays. Dr. Delson worked from home and was not required to be on campus at all on the two days she was not scheduled to teach.

In 1996, Dr. Brickman for the first time told Dr. Delson that she believed Dr. Delson's condition was "not serious." Dr. Brickman asserted, "So what if you are a little spastic and you have a little problem with your gait." Dr. Brickman also specifically referred to the medical report by Dr. Kamin, dated September 8, 1993, and claimed the report was only sufficient for an accommodation of a three-day teaching schedule and not a schedule permitting Dr. Delson to work from home on the two days free of classes. As a result, the Dean, *with the consent* of Dr, Delson, spoke to Dr. Kamin directly, and asked Dr. Kamin for further information about the need for an accommodation that did not require Dr. Delson's presence on campus on the two non-teaching days.

In December of 1996, Dr. Kamin again wrote to the Dean and reaffirmed that Dr. Delson should have no more than a three-day presence on campus:

> Dr. Delson's condition is permanent. There is no likelihood of recovery from this condition or of amelioration of her disability. However, she is fully capable of discharging the duties of her position with the limitation that she spend no more than three days a week on campus, and that her duties be scheduled to avoid late afternoon responsibilities. These are the same recommendations for an accommodation which I made in 1993. At that time, I had stated these limitations as a "schedule of three days a week of teaching". However, it is clear that I meant this to encompass all other duties of her position as well, and I am making it explicit that a limitation of three days a week on campus refers to any and all of the duties of her position.

In May 1997, the Dean again asked for more information. This time he insisted that Dr. Delson sign a general release, *effective for one year*, that would authorize the disclosure of her

complete medical record to any "Academy official." The release form contained no limitations. Dr. Delson informed the Dean that the Civil Rights Officer of the Department of Transportation "advised [her] not to sign the release form."[5]

C. Requiring further information about the ADA disability and the need for an accommodation that already were known and obvious served no legitimate operational purpose.

EEOC Enforcement Guidance delineates when an employer cannot ask for further documentation:

> An employer cannot ask for documentation when: (1) both the disability and the need for reasonable accommodation are obvious, or (2) the individual has already provided the employer with sufficient information to substantiate that s/he has an ADA disability and needs the reasonable accommodation requested.

EEOC Enforcement Guideline on Reasonable Accommodation, 8 FEP (BNA) 405:7607-08. See, also, EEOC Guidance on Disability-Related Inquiries, *supra*, 8 FEP (BNA) 405:7713, n. 54, citing EEOC Guidance on Reasonable Accommodation, *supra*, note 6, at 14-15, 16-17, 8 FEP at 405:7609.

No vital need existed for the Dean to ask for additional documentation. Dr. Delson required an unpaid leave for the same reason she requested a modified schedule five years earlier. Both the nature and severity of the MS-related fatigue and need for a modified schedule or, in the alternative, a leave of absence were known and obvious. There was no need to ask for more medical documentation. The Dean knew that she has a covered disability for which her need for an accommodation was obvious. He also realized that Dr. Delson

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[5] The Dean did not question the sufficiency of the medical documentation submitted previously to substantiate an ADA disability and the need for an accommodation of a three day teaching schedule established four years earlier in 1993. The Dean claimed that he sought this authorization in order to further evaluate the need for an accommodation that did not require her to be on campus on non-teaching days. He gave no reason explaining why he considered Dr. Kamin's reports sufficient for a three-day teaching schedule but not a schedule that permitted Dr. Delson to work from home on the two days free of classes.

requested a leave for the same reason she first requested an accommodation five years earlier.

EEOC Enforcement Guidance delineates further when an employer cannot ask for more documentation in examples substantially identical to the circumstances of the instant case:

> *Example B:* One year ago, an employer learned that an employee had bipolar disorder after he requested a reasonable accommodation. The documentation provided at that time from the employee's psychiatrist indicated that this was a permanent condition which would always involve periods in which the disability would remit and then intensify. The psychiatrist's letter explained that during periods when the condition flared up, the person's manic moods or depressive episodes could be severe enough to create serious problems for the individual in caring for himself or working, and that medication controlled the frequency and severity of these episodes.
>
> Now, one year later, the employee again requests a reasonable accommodation related to his bipolar disorder. Under these facts, the employer may ask for reasonable documentation on the need for the accommodation (if the need is not obvious), but it cannot ask for documentation that the person has an ADA disability. The medical information provided one year ago established the existence of a long-term impairment that substantially limits a major life activity.

Enforcement Guidance: Reasonable Accommodation, *supra*, 8 FEP at 405:7610. See, also, Enforcement Guidance: Reasonable Accommodation *supra*, 8 FEP (BNA) 405:7609-10; Enforcement Guidance: Disability-Related Inquiries, *supra*, 8 FEP 405:7713, n. 54, citing Reasonable Accommodation, *supra*, 8 FEP at 405:7607-09.

Here, requiring more documentation was not founded on an interest adequate to satisfy the business necessity standard but simply would expose Dr. Delson to blatant and subtle

stigma. She already provided medical information, which the Academy itself treated as sufficiently detailed to substantiate an ADA disability, the restriction it imposed, and the necessity of a modified schedule.

Nevertheless, Dr. Delson in good faith sought to cooperate and asked Dr. Kamin to update the medical reports already provided to the Academy. On July 22, 1998, Dr. Kamin, wrote his most recent update to the Academy, stating that *no additional accommodation was required*, and reaffirmed his findings and recommendations stated in his four previous reports, dated May 26, 1993, September 8, 1993, December 17, 1996, and February 13, 1997, that Dr. Delson suffers from MS-related fatigue, a permanent condition, and she is capable of fulfilling the duties of her position on campus and at home, with the limitation that she spend no more than three days a week on campus, and the balance of the week working from home.

D. Absent conflicting expert testimony, the sufficiency of documentation Dr. Kamin provided was not placed in doubt.

The difficulty of proof that medical inquiries must be shown by the employer to be no broader or more intrusive than necessary rests upon the technical nature of the subject matter involved. The disability and the necessity of accommodations are ordinarily not matters of ordinary lay knowledge, but require special scientific training to elucidate. *Connors v. University Associates In Obstetrics and Gynecology, Inc.*, 4 F.3d 123, 127 (2d Cir. 1993); *McDermott v. Manhattan Eye, Ear and Throat Hospital*, 15 N.Y.2d 20, 24, 255 N.Y.S.2d 65,69, 203 N.E.2d 469, 471-472 (1964).

At trial, the Academy did not present expert testimony in this regard identifying any insufficiency in the medical documentation submitted to substantiate an ADA disability and the need for the accommodations requested. Without the essential medical expert testimony establishing the necessity for the medical data requested, all suggestions of such a genuine need are purely conjectural and unreliable. The

sufficiency of medical data already provided was not placed in doubt.[7]

E. Prohibited inquiry claims have their own specialized legal standards.

The protocol for evaluating Dr. Delson's claims is not subject to the analysis necessary for evaluating a reasonable accommodation claim or a general discrimination claim.[8] Merely showing that the Dean required Dr. Delson to respond to the inquiries but refused to treat the medical information requested as a confidential medical record is sufficient to assert a cause of action for unlawful inquiry under the Act.[9] 42 U.S.C.A. §§12112(d)(3)(B) and (d)(4)(C); 29 C.F.R. §1630.14(b)-(d).

A separate and distinct cause of action predicated on an inquiry that lacks a legitimate business purpose also has its own specialized legal standards. *Conroy v. New York State Department of Correctional Services, supra.* The first issue that must be addressed is whether the employer's question is a disability-related inquiry. The second issue is whether the

[6] The trial court erroneously relied on an alleged out of court statement of a health care professional who did not testify at the trial. The statement, over Dr. Delson's objection, was admitted as an exception to the hearsay rule to show the alleged good faith of the Academy, and not to verify that it lacked less intrusive alternatives or that the medical documentation provided was insufficient. See, *Parker v. Sony Pictures Entertainment,* 260 F.3d 100, 113 (2d Cir. 2001) (employer's good faith belief in the legality of its practices is a factor relevant only to the scope of relief, not the existence of liability). In any event, the Dean withheld from the health care provider a copy of Dr. Kamin's most recent update, dated July 22, 1998.

[7] Dr. Delson need not establish that there has been an intention to discriminate in order to prevail in this case. *Alexander v. Choate,* 469 U.S. 287, 295-97, 105 S.Ct. 712, 717-18, 83 L.Ed.2d 661 (1985); *Parker v. Sony Pictures Entertainment, supra,* 260 F.3d at 113; *Nathanson v. Medical College of Pennsylvania,* 926 F.2d 1368 (3rd Cir. 1990). "[T]he Rehabilitation Act was directed particularly at unintentional conduct because "[d]iscrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect." *Bennett v. Henderson, supra,* 15 F.Supp.2d at 1107, quoting *Alexander v. Choate, supra,* 469 U.S. 287, 295, 105 S.Ct. 712.

[8] Even if a finding on the issue of business necessity has been made, a claim challenging an employer's refusal to treat information requested as a confidential medical record is a separate one that still would have to be considered and resolved. 42 U.S.C.A. §§12112(d)(3)(B) and (d)(4)(C).

person is an employee. If the person is an employee, the final question is whether the inquiry is job-related and consistent with business necessity.

Under section 12112(d)(4)(a), a "disability related inquiry" in and of itself will be enough to assert a cause of action. Merely showing questions were asked is sufficient to prove discrimination. 42 U.S.C. § 12112 (d)(1), (d)(4)(A); *Conroy v. New York State Department of Correctional Services, supra,* 333 F.3d at 96 (requesting a general diagnosis from an employee returning from a one-day absence is sufficient to trigger the protection of the ADA prohibition forbidding disability-related inquiries); *Roe v. Cheyenne Mountain Conference Resort,* 920 F.Supp. 1153, 1154-1155 (D. Colo. 1996) aff'd in pertinent part, 124 F.3d 1221 (10th Cir. 1997) (requiring employees to disclose their prescription drug medication is a prohibited inquiry because such a disclosure would likely force employees to reveal disabilities or perceived disabilities); *Doe v. Kohn Nast & Graf, P.C.,* 866 F. Supp. 190 (E.D. Pa. 1994) (employer conducted an unlawful medical inquiry when it searched the office of an employee to confirm its suspicions about the employee's medical condition, and discovered a letter indicating the employee had AIDS).

F. The Academy must bear the cost of its "lost opportunity" to determine whether, with reasonable accommodations, Dr. Delson could have remained an "otherwise" qualified individual with a disability.

"Once a plaintiff demonstrates that a discriminatory factor 'play[ed] a motivating part in an employment decision,' defendant must demonstrate that it would have made the same decision based upon the legitimate factor alone." *Cosgrove v. Sears, Roebuck & Co.,* 9 F.3d 1033, 1039-1040 (2d Cir. 1993).[9]

[9] The mixed-motive analysis available in the Title VII context applies equally to cases brought under the ADA. *Parker v. Columbia Pictures Industries,* 204 F.3d 326, 336-337 (2d Cir. 2000). The Academy may not prevail by offering a reason for its decision if that reason did not motivate it at the time of the decision.' *Cosgrove, supra,* 9 F.3d at 1039-1040 citing *Price Waterhouse v. Hopkins,* 490 U.S. 228, 252, 109 S.Ct. 1775, 1791, 104 L.Ed.2d 268 (1989). *Bennett v. Henderson, supra,* 15 F.Supp.2d at 1103 citing *Woodman v. Runyon,* 132 F.3d 1330 (10th Cir. 1997) ("[C]ourts should be wary of

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The Academy's assertion that it fired Dr. Delson based on her noncompliance with the inquiries and her absence First Term, amounts to discharge solely because of her disability. By refusing to consider accommodations that were obvious for Dr. Delson's known disability and by relying on impermissible inquiries to justify this decision, requires a finding that she was, in fact, otherwise qualified for the position, and was terminated because of her disability.[10] Thus, the Academy must bear the cost of its "lost opportunity" to determine whether, with reasonable accommodations, Dr. Delson could have remained otherwise qualified for the position of employment. *Cosgrove v. Sears, Roebuck & Co., supra,* 9 F.3d 1033, 1040.

Dr. Delson herself need not establish that she is an "otherwise" qualified individual with a disability, in order to state a claim challenging an unlawful inquiry. 42 U.S.C. § 12112(d). *Conroy v. New York State Department of Correctional Services,* 333 F.3d 88, 94-95 (2d Cir. 2003).[11] Once a finding on

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applying cases interpreting federal grantees' duties of reasonable accommodation under section 504 to cases brought under section 501," due to the 'heightened duties of 'reasonable accommodation' and affirmative action placed upon federal employers under section 501, not applicable to federal grantees and under 504, or private employers under the ADA").

[10] Terminating a disabled employee based on absenteeism where the absence was the reasonable accommodation requested is disability discrimination. *Parker v. Columbia Pictures Industries, supra,* 204 F.3d 326 (2d Cir. 2000) citing *Borkowski v. Valley Cent. Sch. Dist., supra,* 63 F.3d 131, 143 (2d Cir. 1995).

[11] The statutory language does not refer to qualified individuals with disabilities, but instead merely to "employees." 42 U.S.C. § 12112(d)(3)(B), (d)(4)(A), (d)(4)(B) and (d)(4)(C). The statutory language makes clear that the ADA's restrictions on inquiries and examinations apply to all employees, not just those with disabilities. *Conroy v. New York State Department of Correctional Services, supra,* at 95, citing Enforcement Guidance on Disability-Related Inquiries. See, also, *Roe v. Cheyenne Mountain Conference Resort, Inc., supra,* at 1229; *Griffin v. Steeltek ,Inc.,* 160 F.3d 591, 595 (10th Cir. 1998), *cert. denied,* 526 U.S. 1065, 119 S.Ct. 1455 (1999)(a job applicant without a disability can sue under the ADA regarding medical history questions); *Fredenburg v. Contra Costa County Department of Health*

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the issue of unlawful inquiry has been made, the question of reasonable accommodation is a separate one that should be considered and resolved in the assessment of damages. The Academy cannot simply invoke the disability of Dr. Delson for the purpose of reducing the damages for which it is liable. The burden shifts to the Academy to affirmatively plead and prove that Dr. Delson is no longer an individual "otherwise" qualified to perform the duties of the position of Associate Professor. If an accommodation is needed, the Academy must show that no effective reasonable accommodation exists that would render Dr. Delson "otherwise" qualified for the position.[12] If the Academy cannot show that the

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Services, 172 F.3d 1176, 1182 (9th Cir. 1999) (requiring plaintiffs to prove that they are persons with disabilities to challenge a medical examination would render §12112(d)(4)(A) of the ADA "nugatory"; thus, plaintiffs need not prove that they are qualified individuals with a disability to bring claims challenging the scope of medical examinations under the ADA); *Cossette v. Minn. Power & Light*, 188 F.3d 964, 969 (8th Cir. 1999) ("We are persuaded by the holdings of the Ninth and Tenth Circuits that a plaintiff need not be disabled to state a claim for the unauthorized gathering or disclosure of confidential medical information"); *accord Murdock v. Wash.* 193 F.3d 510, 512 (7th Cir. 1999), *cert. denied*, 529 U.S. 1134 (2000) (the ADA "does not require that an individual be disabled to state a claim" for unlawful employer inquiries); *Gonzales v. Sandoval County*, 2 F.Supp. 2d 1442, 1445, (D. N.M. 1998) (plaintiff need not establish disability to state a claim for a prohibited inquiry under the ADA).

[12] The applicable regulations provide that the federal government "shall become a model employer of individuals with handicaps." 29 C.F.R. § 1614.203(b). Federal employers "must play a considerable role in ensuring that every reasonable effort" is made to find suitable jobs for disabled employees. *Bennett v. Henderson, supra*, 15 F.Supp.2d at 1107-1109. An employer, to meet its burden may not merely speculate that a suggested accommodation is not feasible." In *Bennett v. Henderson, supra*, 15 F.Supp.2d at 1107-1109. The duty to make reasonable accommodations at the very least triggers a responsibility on the employer's part to investigate a request for accommodation and determine its feasibility. *Parker v. Columbia Pictures Industries, supra*, citing *Borkowski v. Valley Cent. Sch. Dist., supra*, 63 F.3d at 143. The employer also must engage with the employee in an interactive process to determine the appropriate accommodation under the circumstances. 42 U.S.C. § 12111(9); 29 C.F.R. § 1630.2(o)(3); Part 1630; Part 1630 App., § 1630.9; *Haschmann v. Time Warner Entertainment Company*, 151 F.3d 591 (7th Cir. 1998).

accommodation needed poses an undue hardship, then she is otherwise qualified for the job in question and there is no reason to deny her the accommodation to enable her to perform the essential functions of the job. 42 U.S.C. § 12111(8) and (9); *Borkowski v. Valley Central School District*, 63 F.3d *supra*, at 134 and 139; *Rascon v. U.S. West Communications, Inc.*, 143 F.3d 1324, 1330 (10th Cir. 1990).

G. The Academy by its own admission concedes that Dr. Delson is an "otherwise qualified" individual with a disability.

The Academy affirmatively pleaded and admitted that until Dr. Delson went on leave she maintained a good record of employment without cause for dismissal. The facts are not in controversy.[13] The Dean and Dr. Brickman, in her capacity as Department Head, made this assessment based on standards of performance applicable to the position of Associate Professor. The facts are not in controversy.

H. The expert medical testimony established without contradiction that accommodating Dr. Delson would not pose an undue hardship.

In published reports, Dr. Delson's neurologist opined that with the reasonable accommodation of a modified schedule she was fully capable of fulfilling the duties of her position on campus and at home, with the limitation that she spend no more than three days a week on campus.

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[13] In paragraph "17" of its amended answer, the Academy "admits that [Dr. Delson] had, prior to June 1998, been rated Fully Successful in her position . . . " Under the Academy's Performance Management Appraisal System, Dr. Delson received an "Exceptional" evaluation each year from AY89-90 until AY96-97, when the rating levels were revised – i.e., "Exceptional" was eliminated and "Fully Successful" was renamed "Proficient." Thereafter, Dr. Delson's work was consistently rated as Fully Successful, with no need for improvement. The medical expert testimony supports this conclusion without material conflict. The Academy never made an assessment that Dr. Delson's standard of performance was below minimum standards applicable to the position of Associate Professor.

The concurring trial testimony of the Academy's medical expert shows:

> A. I felt that based upon her objective neurological findings, and my knowledge of her work requirements as an associate professor, that there was no reason why she could not teach a 40-hour workweek.

Expert testimony in this regard was essential to support the conclusion of the trial court that Dr. Delson was unable to perform any function of the position except between the hours of 10:00 a.m. and 3 p.m., Monday and Wednesday, and between 10 a.m. and 2:00 p.m. on Friday. *Connors v. University Associates In Obstetrics and Gynecology, Inc., supra,* 4 F.3d at 127; *Hegger v. Green,* 646 F.2d 22, 28 (2d Cir. 1981); *Detwiler v. Bristol-Myers Squibb Co.,* 884 F.Supp. 117, 122 (S.D.N.Y. 1995) *Morgan v. State of New York,* 40 A.D.2d 891, 337 N.Y.S.2d 536 (3rd Dept. 1972) aff'd 34 N.Y.2d 709, 356 N.Y.S.2d 860, 313 N.E.2d 340 (1974). The expert testimony unanimously supports the opposite conclusion without any material conflict.

Dr. Delson never required an accommodation that compressed every essential function of the job within the block of time she was scheduled to teach. Rather, she requested a teaching schedule within a block of time when her energy level is highest between 10:00 a.m. and 3:00 p.m., and no later than 2:00 p.m. Friday. And she was available to teach any three-business days (Monday through Friday). Applying this request, Dr. Delson was available to teach at least 14 class periods per week, not eight periods a week. [14]

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[14] Dr. Delson requested a class scheduled no earlier 10:00 a.m.. Granting this request eliminates periods one and two as potential scheduling times. She also requested no classes after 3:00 p.m. and not later than 2:00 p.m. Friday. Granting this request eliminates period six Monday through Thursday and periods five and six on Fridays. This means that Dr. Delson is available to teach, a minimum of three class hours a day (periods three, four and five) Monday through Thursday, and two class hours (periods three and four) on Friday, for a total of 14 periods a week, with the restriction that she spend no more than three days a week on campus. She did not request a teaching schedule limited to Monday, Wednesday and Friday for only eight class periods a week.

Expert medical testimony also established without contradiction that Dr. Delson with reasonable accommodation was capable of working eight hours daily to fulfill all the duties of her position on campus and at home, with the limitation that she spend no more than three days a week on campus, and work at home the balance of the week. Under the circumstances of the present case, where the ultimate accommodation required could have been determined only in light of highly specialized medical knowledge, expert medical testimony is essential for the Academy to establish that Dr. Delson could not, if granted the reasonable accommodation requested, fulfill the essential functions of the position. *Connors v. University Associates In Obstetrics and Gynecology, Inc., supra,* 4 F.3d at 127; *Hegger v. Green, supra,* 646 F.2d at 28; *Detwiler v. Bristol-Myers Squibb Co., supra,* 884 F.Supp. at 122; *Morgan v. State of New York, supra.*

I. Promotion standards for the senior rank of Full Professor are not relevant.

At trial, Dr. Brickman, Department Head, answered YES, in response to the question: Do the standards for promotion to the senior rank of Full Professor require a higher level of achievement than the standards of performance Dr. Delson was expected to maintain to be "Fully Successful" in her position as an Associate Professor?[15] The trial court by relying

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[15] Before Dr. Delson went on leave, Dr. Brickman, as Head of the Humanities Department, wrote in a promotion review on May 7, 1998, that Dr. Delson is a "dynamic lecturer," "effective teacher" and "well regarded historian" who presents a "fine record of publications" and "regularly receives high evaluations." In December of 1997, Dr. Brickman also judged Dr. Delson's institutional service (i.e., Faculty Advisor to the Debate Team and Chair of the Faculty Forum's Library Committee) of the standard necessary to merit promotion to the rank of Full Professor. Five months later, Dr. Brickman raised the bar. She wrote on May 7, 1998, that Dr. Delson's institutional service has "improved this year" but because she lacked membership on an "institutional governance committee," her level of service was not sufficiently distinctive to merit promotion from Associate Professor to the senior rank of Full Professor. Five months earlier, Dr. Brickman did not believe Dr. Delson required membership on "a governance committee" in order to distinguish herself to merit promotion.

on a standard for promotion to Full Professor erroneously required Dr. Delson to demonstrate a greater level of performance than an Associate Professor is expected to maintain.

J. The record does not reflect that accommodating Dr. Delson requires significant difficulty or expense.

Although the record contains no estimates of the costs involved in making the accommodation, the cost would clearly not exceed the benefit to be derived in view of the fact that evidence indicates that the requested accommodations would permit Dr. Delson to perform the essential functions of an Associate Professor.[16] Under the ADA, "undue hardship" means "an action requiring significant difficulty or expense" when considered in light of various factors. 42 U.S.C. § 12111 (10)(A).[17] The record before the trial court does not reflect that

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[16] "By definition any special 'accommodation' requires the employer to treat an employee with a disability differently, i.e., preferentially. And the fact that the difference in treatment violates an employer's disability-neutral rule cannot by itself place the accommodation beyond the [ADA's] potential reach." *US Airways, Inc. v. Barnett*, 535 U.S. 391, 397, 122 S.Ct. 1516, 152 L.Ed2d 589 (2002). " * * * The simple fact that an accommodation would provide a 'preference' – in the sense that it would permit the worker with a disability to violate a rule that others must obey – cannot, *in and or itself*, automatically show that the accommodation is not 'reasonable'. " Id.

"[T]he requirement of reasonable accommodation anticipates that it may cost more to obtain that level of performance from an employee with a disability than it would to obtain the same level of performance from a non-disabled employee. *See id.* And Congress fully expected that the duty of reasonable accommodation would require employers to assume more than a *de minimis* cost. *See id.*, pt. 2, at 68, *reprinted in* 1990 U.S.C.C.A.N. at 350; *id.*, pt. 3, at 40, *reprinted in* 1990 U.S.C.C.A.N. at 463." *Borkowski v. Valley Central School District, supra*, 63 F.3d at 138, n. 3.

[17] When considering undue hardship, the ADA requires the courts to consider the following factors:

> (i) the nature and cost of the accommodation needed under this chapter;
>
> (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect

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the impact on the Academy of accommodating Dr. Delson would reach that point. Moreover, "[i]n view of the affirmative goal of the federal government to be a model employer for those with disabilities . . . an accommodation which would be unreasonable for a private employer could be found to be a reasonable undertaking for the federal government. See *Woodman*, 132 F.3d at 1344 n. 14." *Bennett v. Henderson*, 15 F.Supp.2d 1097, 1112 aff'd 172 F.3d 62 (10th Cir. 1999).[18]

K. The unpaid leave of absence did not pose an undue hardship First Term.

The trial court found that the leave First Term AY98-99 was a reasonable accommodation, and, thus, Dr. Delson was an "otherwise qualified" individual with a disability since she could perform the essential functions of the job upon completion of the leave. The trial court's finding that the accommodation was reasonable prevents the Academy from

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> on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
>
> (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
> (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity. 42 U.S.C. § 12111(10)(B).

[18] "It is well established both by the statutory language and Supreme Court decisions interpreting the [Rehabilitation] Act that federal employers have greater duties to accommodate disabled workers under section 501 than the duties owed by federal grantees under section 504 or those owed by employers under the ADA." *Woodman v. Runyon, supra*, 132 F.3d at 1343; *Bennett v. Henderson, supra*, 15 F.Supp.2d at 1104-1105. "There is little to stop the federal government from expending considerable money and effort to become a model employer of handicapped individuals, when that is its chosen policy," (quoting Lex K. Larson, *Employment Discrimination* § T106.44(a) (2d ed.1977)." *Bennett v. Henderson, supra*, 15 F.Supp.2d at 1112. *Borkowski v. Valley Central School District, supra*, 63 F.3d at 142-143, n. 5 (". . . Section 501 requires federal employers to take affirmative steps (above and beyond reasonable accommodation) . . . Federal employers therefore may be required to do more under Section 501 than recipients of federal funds under Section 504.").

asserting the unpaid leave of absence First Term posed an undue hardship requiring significant difficulty or expense.

L. The record does not reflect the impact on the Academy that would be caused by a three day teaching schedule comprised of three courses that each meet twice a week for a total of six class hours and end no later than 2:00 p.m., Friday, Second Term.

Dr. Delson's assignment Second Term called for three courses that each met *twice* a week for a total of *six* class hours a week upon her return from leave. The facts are not in controversy.[19] Although the record contains no estimates of the costs involved in making the accommodation requested, the cost would clearly not exceed the benefit to be derived in view of the fact that evidence indicates that this accommodations would permit Dr. Delson to perform all essential functions of her position as associate professor.

M. The record does not reflect the specific impact of a three-day teaching schedule comprised of three courses that each meet twice a week (for a total of six class hours) and end no later than 2:00 p.m. Friday after Second Term.

First Term AY98-99 the Academy commenced a three-year transition to a trimester calendar from a quarter system. The Academy introduced an ample number of courses that met for one hour twice a week for a total of two hours a week during the transition to the new trimester system. Although the record contains no estimates of the costs involved in affording Dr. Delson a three-day teaching schedule comprised of three courses that each meet twice a week for a total six hours and end no later than 2:00 p.m. on Friday as an accommodation, the cost would clearly not exceed the benefit to be derived in view of the fact that evidence indicates that the requested accommodations would permit Dr. Delson to

[19] In paragraph "17" of its amended answer, the Academy affirmatively pleads and admits: ". . . that Dr. Delson was scheduled for the Winter Term 1998 to work twice a week, for a total of six classes a week.". The facts are not in controversy. The trial court concluded, with no foundation in the record, that a three-day teaching schedule Second Term would pose an undue hardship based on the mistaken assumption that Dr. Delson was assigned three classes that each met three times a week (for a total of nine hours) on Monday, Wednesday and Friday. This finding, contrary to the undisputed facts, is definitely mistaken.

perform all essential functions of her position as associate professor.

N. The record does not reflect the impact on the Academy that would be caused by a three-day teaching schedule comprised of three courses that each meet three days a week and end no later than 2:40 p.m. on Thursday.

Under the quarter system, the Academy routinely assigned three day schedules comprised of three courses that each met three times a week through the Fourth Quarter AY97-98. During the transition, the Academy still scheduled classes for the most part that met for one hour three days a week for a total of three hours a week. Dr. Delson was available any three-business days (Monday through Friday). Further, classes are assigned that meet no more than three days a week and end no later than 2:40 p.m. on Thursday. Although the record contains no estimate of the costs involved in affording Dr. Delson a three-day teaching schedule comprised of three courses that each meet three times a week for a total of nine hours and no later than 2:40 p.m., on Thursday, the cost would clearly not exceed the benefit to be derived in view of the fact that evidence indicates that the requested accommodations would permit Dr. Delson to perform all essential functions of her position as associate professor.

O. The record does not reflect the specific impact on the Academy that would be caused in the event Dr. Delson were given further unpaid leave of absence.

Allowing Dr. Delson an unpaid leave of absence did not absolve the Academy of its duty to ensure that every reasonable effort is made to find a suitable accommodation. The Academy's liberal leave policy permits instructors to routinely take extended leaves of absence with "no limitation" on the amount of time that a leave without pay (LWOP) may be granted.[20] A further

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[20] *See* 29 C.F.R. 1630 app. § 1630.2(o), *Rodgers v. New York University*, 143 F.Supp.2d 310 (S.D.N.Y. 2002); *Durant v. Chemical/Chase Bank*, 81 F. Supp.2d 518, 522 (S.D.N.Y. 2000); *Powers v. Polygram Holding, Inc.*, 40 F.Supp.2d 195, 202 (S.D.N.Y. 1999); *Criado v. IBM Corp.*, 145 F.3d 437 (1st Cir. 1998); *Cehrs v. Northeast Ohio Alzheimer's Research Ctr.*, 155 F.3d 775 (6th Cir. 1998); *Haschmann v. Time Warner Entertainment Co.*, 151 F.3d 591 (7th Cir. 1998); *Humphrey v. Memorial Hospitals Association*, 239 F.3d 1128, 1136 (9th Cir. 2001), citing *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th

(Cont'd)

leave would be less accommodating than the federal employer's own policies required. The fact that Dr. Delson's duties continued to be covered by co-workers and adjunct faculty after she went on leave does not establish that granting her an accommodation would have caused the Academy undue hardship during the transition. This prevents the Academy from asserting that a further leave would produce an undue burden on its operations. Thus, the Academy failed to carry its burden of demonstrating that the accommodation requested would cause undue hardship.

P. The record does not reflect the specific impact on the Academy that would be caused if Dr. Delson were assigned no courses that met four days a week during the transition.

Classes that met four days a week as "slash" courses also were introduced for the transition to a trimester calendar. After the three-year transition, slash courses were eliminated and all courses again are taught no more than three days a week. Moreover, courses that had been designated slash courses were "unslashed" and rescheduled to meet no more than three days a week.

First Term AY98-99 the Academy assigned Dr. Delson "slash" courses, thereby requiring her to be on campus four days a week. The Dean refused to consider any accommodation unless she complied with the medical inquiry. In addition, members of the Academy Faculty Committee, including the Dean and Dr. Brickman, who were responsible for switching Dr. Delson's assignment, testified that continuation of three day teaching schedule as an accommodation of a modified schedule was not given any consideration, the decision to assign a four-day teaching schedule was "purely arbitrary," "it was not 'essential' to slash the courses [Dr. Delson] taught" and, as such, four-day schedule may not be considered an essential job function. Although the record contains no estimate of the costs involved in affording Dr. Delson a three-day teaching schedule that ended no later than 1:10 p.m. on Friday, with no "slash" classes, the cost would clearly not exceed the benefit to be derived in view of the fact that evidence indicates that the requested accommodations

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Cir.1999); *Kimbro v. Atlantic Richfield Co.*, 889 F.2d 869 (9th Cir. 1989) cert. den. 498 U.S. 814, 111 S.Ct. 53, 112 L.Ed.2d 28 (1990); *Rascon v. U.S. West Communications, Inc.*, 143 F.3d 1324 (10th Cir. 1998).

would permit Dr. Delson to perform all essential functions of her position as associate professor.

Q. The record does not reflect the specific impact on the Academy that would be caused in the event the Academy afforded Dr. Delson the same favorable treatment given non-disabled employees, similarly situated.

Nondisabled employees, similarly situated were given modified schedules which, if given Dr. Delson, would have afforded her a three day assignment of no "slash" courses at all, or, in the alternative, "slash" courses that met for extended 90 minute periods some days or simply cut one class hour a week.[21] Although the record contains no estimate of the costs involved in affording Dr. Delson the same favorable treatment given non-disabled employees, similarly situated, the cost would clearly not exceed the benefit to be derived in view of the fact that evidence indicates that the requested accommodations would permit Dr. Delson to perform all essential functions of her position as associate professor.

CONCLUSION

For all the foregoing reasons, petitioner respectfully requests that the Supreme Court grant review of this matter.

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[21] Daily attendance at the Academy is not an essential job duty. The Academy has a liberal policy that allows instructors to work from home and not be on campus every day. The Academy adopted this policy based on the recognition that faculty members are professional scholars and the nature of their responsibilities makes it necessary and desirable that they have maximum freedom and flexibility in the performance of their duties. The Academy, moreover, invites instructors to request teaching assignments in conformance with their own individual scheduling preferences, which the Academy has almost always been able to arrange.

The Academy routinely fashions schedules to conform to scheduling preferences of instructors and to resolve scheduling conflicts, which, if given Dr. Delson, would have afforded her no more than a three-day schedule (e.g., classes meet less frequently for extended periods; classes meet less frequently and fewer hours than the standard schedule; classes are approved for lunch hour sandwiched between the third period and fourth period in conformance with the instructor's for a two day teaching schedule; students carry an extra course in order that the course schedule conforms with the instructor's preference for no more than two class meetings a week; and, independent studies allow students to complete a required course but attend fewer meetings than the number of class sessions assigned for the same course on the regular teaching schedule.

Respectfully submitted,

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APPENDIX

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED JULY 22, 2005

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket No. 04-4118

ROBERTA M. DELSON,

Plaintiff-Appellant,

- v -

NORMAN MINETA, in his capacity as Secretary of the United States Department of Transportation,

Defendant-Appellee.

July 22, 2005

Present: WESLEY, HALL, *Circuit Judges*, and SCULLIN, *District Judge*.[1]

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court be **AFFIRMED**.

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1. The Honorable Frederick J. Scullin, Chief Judge of the United States District Court for the Northern District of New York, sitting by designation.

Appendix A

Plaintiff-appellant Delson appeals from a Memorandum, Decision, and Order of the United States District Court for the Eastern District of New York (Seybert, J.), issued after an eight-day bench trial, finding in favor of defendant on all of plaintiff's claims and dismissing the action. Familiarity by the parties is assumed as to the facts, the procedural context, and the specification of appellate issues.

"[U]nder . . . the Rehabilitation Act, a plaintiff can state a claim for discrimination based upon her employer's failure to accommodate her handicap by alleging facts showing (1) that the employer is subject to the statute under which the claim is brought, (2) that she is an individual with a disability within the meaning of the statute in question, (3) that, with or without reasonable accommodation, she could perform the essential functions of the job, and (4) that the employer had notice of the plaintiff's disability and failed to provide such accommodation." *Lyons v. Legal Aid Soc.*, 68 F.3d 1512, 1515 (2d Cir. 1995). Substantially for the reasons stated in the district court's opinion, we agree that plaintiff failed to show the defendant denied her a reasonable accommodation. We agree with the district court's assessment that it was plaintiff's refusal to provide the defendant with any specific medical documentation and her refusal to compromise on any of her scheduling demands, that precipitated the failure of the "interactive process" between employer and employee that the ADA envisions. *See generally Jackan v. New York State Dep't of Labor*, 205 F.3d 562, 566 (2d Cir. 2000).

We similarly reject plaintiff's claim that the defendant's medical inquiries were unlawful. In seeking to determine the extent and types of accommodation that were truly necessary

for plaintiff, the defendant's inquiries were "job-related and consistent with business necessity." 42 U.S.C. § 12112(d)(4)(A). *See Conroy v. N.Y. State Dep't of Corr. Servs.*, 333 F.3d 88, 97-98 (2d Cir. 2003) (explaining that "business necessities may include ensuring that the workplace is safe and secure or cutting down on egregious absenteeism"). We have considered all of plaintiff's remaining arguments and find them to be without merit.

Accordingly, for the reasons set forth above, the judgment of the district court is hereby AFFIRMED.

For the Court
Roseann B. MacKechnie, Clerk

s/ Lucille Carr
By:

APPENDIX B — MEMORANDUM, DECISION AND ORDER AFTER BENCH TRIAL OF THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK DATED JUNE 9, 2004

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

99-CV-4723 (JS)

ROBERTA M. DELSON,

Plaintiff,

- against -

NORMAN MINETA, in his capacity as SECRETARY OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION [1],

Defendant.

MEMORANDUM, DECISION AND ORDER AFTER BENCH TRIAL

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1. The United States Secretary of Transportation is the appropriate Defendant in this action, in that the Academy is a federal service academy and part of the Maritime Administration of the U.S. Department of Transportation. The originally named Defendant, Rodney Slater, is the former United States Secretary of Transportation, he was replaced in 2001 by Norman Mineta. Pursuant to Federal Rule of Civil Procedure 25, Secretary Mineta is hereby substituted as the Defendant in this action.

Appendix B

SEYBERT, District Judge:

INTRODUCTION

Plaintiff, Roberta Delson ("Plaintiff"), commenced the instant action on August 16, 1999. Plaintiff alleges that Defendant violated the Rehabilitation Act of 1973, 29 U.S.C. § 701, *et seq.*, by discriminating against her in her employment, by reason of her disability.

BACKGROUND

The Court presided over an eight-day bench trial beginning on May 12, 2003. Based upon the evidence and arguments presented, the Court makes the following findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure. To the extent that any of the findings of fact may be deemed conclusions of law, they also shall be considered conclusions. Likewise, to the extent that any of the conclusions of law may be deemed findings of fact, they shall be considered findings. *See Miller v. Fenton*, 474 U.S. 104, 113-14, 106 S. Ct. 445, 451-52, 88 L. Ed. 2d 405, 413-14 (1985) (noting the difficulty, at times, of distinguishing findings of fact from conclusions of law).

FINDINGS OF FACT

Plaintiff, a published scholar and seasoned history teacher on a college level, was hired by the United States Merchant Marine Academy (the "Academy") as an adjunct professor of history in the Humanities Department in 1987. In 1989, she was hired as a full-time associate professor.

Tr. 847-48. She remained in the position of associate professor until her termination in January 1999. Pl. Ex. 135.

The Academy is a federal service academy and is part of the Maritime Administration of the U.S. Department of Transportation. It is a four-year academic college located in Kings Point, New York. Tr. 726, 984. The mission of the Academy is to train and educate people who will serve as officers on U.S. flagships, as naval reservists, and to train leaders of the maritime industry. Tr. 726. The curriculum at the Academy is particularly rigorous, most classes taken by students are assigned to them; there are few electives. Tr. 747. As a result of the Academy's rigorous academic curriculum, class schedules are driven by the needs and requirements of students, unlike most institutions of higher learning where class schedules are driven by the preferences of professors. It is the registrar at the Academy who makes the final decisions regarding teachers' schedules each term. Tr. 746-47, 323-24.

Professors at the Academy are permitted to state preferences as to their teaching schedules, but because of the complexities of scheduling, the registrar cannot always provide the preferred schedules. Tr. 324-33. Where possible, the Academy had a history of accommodating professors scheduling preferences. For example, instructor Alan Arnold was given modified schedules which conformed with his request for no classes after 2:00 p.m. Tr. 168; Pl. Ex. 6, 120A. Instructor Rosanne Wasserman was granted a schedule according to her preference that classes not begin earlier than 9:00 a.m., and end no later than 2:00 p.m., because of child care. Tr. 166-67; Pl. Ex. 6, 120I. Instructor Laury Magnus

was given a modified schedule that conformed with her request for classes that met no later than 2:00 p.m. Tr. 164-66; Pl. Ex. 6, 120G.

However, in many instances during Plaintiff's time at the Academy, professors other than the Plaintiff were not granted their stated preferences. Tr. 324-333, 494-495; Def. Ex. 234, 251. Further, the Plaintiff was granted a number of her stated preferences. Tr. 623, 640-42, 757-58, 760-61; Pl. Ex. 36, 163. In addition to teaching, professors are expected to work with students, to meet with them through regular office hours, to perform "institutional service" by serving on both Academy-wide and Department-wide committees, and to contribute to efforts for change within their departments. Tr. 338-39, 750, 810.

Daily attendance at the Academy is not an essential job duty. The Academy has a liberal policy that allows instructors to work from home and not be on campus every day. The Academy adopted this policy based on the recognition that faculty members are professional scholars and the nature of their responsibilities makes it necessary and desirable that they have maximum freedom and flexibility in the performance of their duties. Pl. Ex. 3.

Plaintiff's Multiple Sclerosis

Plaintiff was diagnosed with Multiple Sclerosis ("MS") in or about 1986, before she started working at the Academy. Tr. 981. MS is a neurological disorder which can cause different symptoms in different individuals afflicted with the illness and which can have different degrees of severity.

Tr. 1057-1058. When she started at the Academy, Plaintiff filled out a form in which she identified herself as handicapped, due to blindness in one eye and partial paralysis. Tr. 981. She did not disclose her MS in the form, nor did she identify herself as having disabling fatigue. Tr. 982.

The most prominent symptom of Plaintiff's MS at present is fatigue. Tr. 1062. The fatigue associated with Plaintiff's MS occurs every day. Rest does not eliminate it. The nature of the fatigue is not related to what the Plaintiff does or does not do. Tr. 987.

Plaintiff first saw her treating physician, Dr. Stephen Kamin, in 1991. Tr. 1083. At that time, her major complaints were pain on the right side of her head, some urinary frequency, and some fatigue. Tr. 1083. Her fatigue became prominent in July 1992. Tr. 1063. At that time, Plaintiff began to take Cylert, a medication which helps control her fatigue. Tr. 988-989, 1063, 1066-67.

Scheduling Accommodations

In or about or February 1993, Plaintiff learned that she would receive tenure. Tr. 989-90. Shortly thereafter, in April 1993, Plaintiff asked to be relieved from service on the Outcomes Assessment Committee, an Academy-wide committee she had served on for approximately four terms. Tr. 751, 990-91. Dean Warren Mazek ("Mazek" or the "Dean") wrote to Plaintiff on or about April 10, 1993, and informed Plaintiff that he would not excuse her from serving on the Outcomes Assessment Committee. Tr. 752; Def. Ex. 9. In response, Plaintiff explained that she was

asking to be excused because she had research to complete and because she was tired. Tr. 752, 991-92; Def. Ex. 10. Again, on April 29, 1993, the Dean wrote to the Plaintiff and reiterated that she was not being excused from the committee. Def. Ex. 11. Having received the Dean's letter, in early May 1993, Plaintiff told Dr. Arthur Donovan ("Donovan"), the head of her department and her direct first-line supervisor, that she had MS and that it caused her to be fatigued. She told Donovan that this was the reason she sought to be relieved from the Outcomes Assessment Committee. Tr. 576-77, 992-93. She also told Donovan that because of her MS, she desired certain adjustments in her teaching schedule. Specifically, she told Donovan that she needed a three-day schedule, no classes before 10 a.m., no classes after 3 p.m., 2 p.m. on Fridays, teaching back to back days, and no teaching day of more than 5 hours. Pl. Ex. 29.

In May 1993, Dr. Stephen Kamin ("Kamin"), Plaintiff's treating physician, wrote a letter to Donovan, as department head, stating that Plaintiff had MS and describing the condition generally. Tr. 578-80, 993-94; Pl. Ex. 30. Kamin reported that the Plaintiff has MS and her major symptom is overwhelming fatigue and a decrease in stamina. Kamin explained that if Plaintiff overextends herself, fatigue will exacerbate her symptoms and place her health and safety at risk. Kamin further pointed out that Plaintiff required rest periods and should schedule activities of the day when her energy level is highest, so that tasks may be completed and destinations reached safely. Pl. Ex. 30. On or about June 9, 1993, Donovan wrote to the Academy Registrar, Dr. Janet Palmer ("Palmer"), who was responsible for preparing the students' and teachers' class schedules, requesting that

Plaintiff's schedule, which had already been established for the following quarter, be modified because Plaintiff recently had identified a medical problem. Tr. 583-85; Pl. Ex. 29. Ultimately, with input from Mazek, Palmer provided the Plaintiff with a three-day teaching schedule. Tr. 592, 626-27, 757; Pl. Ex. 36. Mazek also arranged for Plaintiff to have no class earlier than 10 a.m. or later than 3 p.m., 2 p.m. on Fridays, for that term. Tr. 642-43.

In July 1993, with Plaintiff's consent, Mazek wrote to Kamin to obtain further information about Plaintiff's medical condition, and about her need for scheduling accommodations in the future. Tr. 759, 996; Pl. Ex. 37. Kamin responded to Mazek's request with a letter dated September 8, 1993. In his letter, he described Plaintiff's condition and its effects on Plaintiff. He indicated that a three-day teaching schedule was "medically warranted," that she should avoid late afternoon classes, and should be provided with an air-conditioned classroom. Tr. 760; Pl. Ex. 38. Thereafter, until the summer of 1998, the Academy granted Plaintiff an accommodation of a three-day teaching schedule, and tried to give her no classes after 3 p.m., 2 p.m. on Fridays. Tr. 760-61, 1003. Although Kamin's letter said nothing about early morning classes, the Academy also granted Plaintiff's stated preference that she not be required to teach before 10 a.m. Tr. 761; Def. Ex. 126; Pl. Ex. 163. The evidence established that there was a fundamental misunderstanding between the parties, in that the Plaintiff believed that she had been granted a firm accommodation incorporating all of her scheduling preferences while the officials at the Academy viewed the scheduling preferences as having been granted more as a courtesy than as an official accommodation.

Further, it seems there was a misunderstanding between the parties, in that the Plaintiff understood that she had been granted a three-day on campus schedule while the Academy officials believed that she had been granted a three-day teaching schedule and could be expected to attend to other responsibilities on campus on the other two days. Tr. 357-58, 760-61, 1010-14, 1017; Def. Ex. 55, 56; Pl. Ex. 110, 163.

Other Accommodations

The Plaintiff was granted a variety of non-scheduling related accommodations throughout the course of her employment. For example, during AY 1993-94, the Academy established handicapped parking close to the building in which she taught. Tr. 1003. The Academy also provided Plaintiff elevator access to the second floor of the Humanities Building, where her office and classroom were located. Tr. 1001-02. Plaintiff also received an air-conditioned classroom. Tr. 1001. Finally, Plaintiff received permission to wear comfortable, non-regulation shoes. Tr. 1003.

Conflicts Regarding Scheduling

A *1995 Committee Meeting*

In September 1995, Dr. Jane Brickman ("Brickman"), who had become the head of the Humanities Department in 1994, assembled an *ad hoc* committee made up of several members of the Humanities Department to try to develop a new History curriculum. Tr. 339-40. On or about February 2, 1996, Dr. Robert Gardella ("Gardella"), one of the members of the Curriculum Committee, requested that

the committee meet on Thursday, February 15, 1996, for two hours. Def. Ex. 53. Curriculum committee meetings were generally held on Mondays, Wednesdays, or Fridays, the days that Plaintiff was scheduled to teach. Tr. 344. Plaintiff objected to the scheduling of the meeting because she did not teach on Thursdays. Tr. 355, 1008-09. After Plaintiff objected to the scheduling of the meeting, Brickman spoke with Gardella to satisfy herself that it was necessary to hold the meeting on a Thursday. Tr. 356-57. In fact, it was necessary because several lengthy proposals needed to be presented, which required more time than was normally available during the one-hour Wednesday meetings. Tr. 355-57. The Thursday afternoon period was the only time that all six members of the committee were available for two consecutive hours. Tr. 355.

Brickman directed Plaintiff to attend the meeting because it was important that Plaintiff participate in the development of the new curriculum. Tr. 358, 1009. Plaintiff asserted that being required to attend the meeting violated her accommodation; she asserted that the Academy had granted her a "three-day work schedule." Tr. 1010-11; Def. Ex. 55; Pl. Ex. 110. Brickman demurred; to the best of her knowledge, as Plaintiff's direct supervisor, the meeting did not run afoul of her accommodation. As Brickman understood it, the Academy had granted plaintiff only a three-day *teaching* schedule, and that Plaintiff could be required to be on campus for meetings and other official business on a fourth day. Tr. 357-58; Def. Ex. 56. Brickman referred to the language of Kamin's letter dated September 8, 1993. Pl. Ex. 38.

Appendix B

B *Academic Schedule: First Quarter 1993-94*

In the first quarter of AY 1993-94, Plaintiff was assigned a schedule which required her to teach four days per week. Pl. Ex. 31. The Plaintiff objected to this schedule and asserted that it was "prejudicial to [her] handicapped status." Pl. Ex. 34. The Plaintiff also registered a complaint regarding the schedule with the Superintendent in charge of the Academy, Thomas T. Matteson. Thereafter, Plaintiff's schedule for the term was changed to a three day per week schedule. Tr. 623-24, 863-66; Pl. Ex. 36.

C *Academic Schedule: Fourth Quarter 1997-98*

In the fourth quarter of AY 1997-98, Plaintiff was assigned a schedule which required her to teach a class from 2-3 p.m. on Fridays. Tr. 429. Plaintiff objected to this schedule, claiming that it violated her accommodation. Tr. 429, 786. The Academy denied that the schedule violated her accommodation, as set forth in Mazek's October 3, 1997 letter. Tr. 786. Nonetheless, Mazek offered to move the class to 8 a.m. on Fridays. Tr. 787. Plaintiff rejected this offer, claiming that an 8 a.m. class also was a violation of her accommodation. Tr. 432-33, 1037.

Plaintiff requested that the Academy reschedule the class to 9 a.m. Tr. 433, 438. Plaintiff taught the class once at 9 a.m. Tr. 434. However, she never asked the Academy to make this change permanent. Rather, she proposed combining her 2-3 p.m. class on Fridays with her 10 a.m. class on Fridays. The Academy rejected Plaintiff's suggestion that her class from 2-3 p.m. be combined with her 10 a.m. class

because the Academy had a policy against doubling up of classes. Tr. 435-37; Def. Ex. 150.

Plaintiff also proposed moving her 2 p.m. class on Fridays to 1 p.m. on Fridays. Tr. 786-88. The Academy also rejected moving the class to 1 p.m. because not all of the students assigned to Plaintiff's 2-3 p.m. class were available at those times. Tr. 786-88. Ultimately, Plaintiff taught her Friday afternoon classes from 2-3 p.m. throughout the rest of the term. Tr. 441.

The Oversized Class

In March 1997, Plaintiff was assigned to teach three classes, three days per week. Due to the complexities of scheduling classes at the Academy, the Registrar designated one of Plaintiff's classes to have more than 30 students. Tr. 377. The size of the one larger class did not increase the total number of students Plaintiff was assigned to teach during the term as compared to the same term the previous year. Tr. 389. When she learned that she would be assigned a class of more than 30 students, Plaintiff objected. She asserted that her voice and larynx would be damaged by having to teach a class so large. Tr. 377. Prior to March 1997, Plaintiff had never asked for an accommodation related to the size of the class she was assigned to teach. Tr. 1030. Plaintiff accused the Academy of discriminating and retaliating against her by "penalizing" her with an "oversized" class. Tr. 1032-33.

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Brickman offered Plaintiff a microphone to ameliorate any problems caused by the oversized class. Tr. 381. Plaintiff declined this offer. Tr. 381. On or about March 21, 1997, ten days before the beginning of the term, Plaintiff told Brickman that she would not teach that term because teaching a class of more than 30 students would be hazardous to her health. Tr. 389-90. Brickman informed Plaintiff that she could apply for leave without pay for the term. However, she told Plaintiff that because she was requesting leave so shortly before the term commenced, she would only approve Plaintiff's application for leave if Plaintiff provided medical documentation. Tr. 393, 395-96.

Plaintiff applied for leave without pay and agreed to provide the requested medical documentation. Tr. 394. Based upon Plaintiff's agreement to provide medical justification for her request for leave, Brickman granted Plaintiff two weeks' leave without pay, in order for Plaintiff to obtain the necessary medical documentation. Tr. 396; Def. Ex. 103. Dr. Brickman also arranged for Beth Vihlen, an adjunct professor, to teach Plaintiff's courses for the term. Tr. 396-97. Plaintiff did not provide the required medical information to support her request for leave without pay. Tr. 394.

On or about April 9, 1997, when it became clear to Brickman that Plaintiff would not provide the requested medical documentation, Brickman informed Plaintiff that she would not approve Plaintiff's application for leave for the rest of the term. Tr. 398; Def. Ex. 103. Accordingly, Plaintiff returned to the Academy on or about April 16, 1997, and taught the classes assigned her for the term, including a class with approximately 34 students. Tr. 412, 418.

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Relationship With Brickman

The evidence established that there was a level of tension between the Plaintiff and Brickman, the Department Head. The Plaintiff asserts that Brickman subjected her to a number of insensitive comments and intrusive questions. For example, the Plaintiff alleges that Brickman questioned why Plaintiff was not taking Betaseron and asked whether the medication was unaffordable on her income. Tr. 905. Plaintiff further alleges that Brickman questioned Plaintiff about bee sting therapy, asked whether she wore slacks because her legs were atrophied, and inquired whether she was injecting Botox, a medication that reduces spacticity in MS patients, to reduce wrinkles. Tr. 903-06. In another instance, Plaintiff alleges that Brickman was skeptical about her handicap driver's permit and claimed that doctors freely supply them to patients just for the asking without cause. Tr. 905. Having reviewed the testimony and having observed the demeanor of both Brickman and the Plaintiff on the stand, the Court concludes that the Plaintiff could not prove, by a preponderance of the evidence, that Brickman in fact subjected her to inappropriate or harassing treatment. The Court does find that the Plaintiff established that there was tension between the two women and the Court finds it likely that Brickman was, at times, insensitive to the Plaintiff's condition.

Attempts to Obtain Medical Records

Following her dispute with Brickman regarding the Thursday committee meeting in 1996, Plaintiff asserted that it was a breach of her privacy rights for Brickman to have a copy of Kamin's letter. Tr. 1015-16. Brickman had obtained

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Kamin's letter from the Department Head personnel file maintained in the Department Head's office, in a filing cabinet kept locked at all times. Tr. 367-68.

On or about May 7, 1996, Mazek wrote to Plaintiff to request that Plaintiff provide further information from Kamin to justify her request for, what Academy officials believed to be a new accommodation, a three-day *on campus* schedule. Tr. 655, 769-70; Pl. Ex. 97, 98. Plaintiff did not provide the requested medical information in May 1996. Tr 770, 772. As a result, in or about June 1996, Mazek wrote to Plaintiff again, reiterating the Academy's request for additional medical information. Tr. 772. He wrote to her again on September 18, 1996. Tr. 772; Def. Ex. 70.

On or about December 17, 1996, Kamin wrote to Mazek in response to Mazek's requests for additional medical information in June and September. Kamin largely reiterated the contents of his September 8, 1993 letter, but also clarified that he intended to recommend that Plaintiff receive a schedule of three days per week *on campus*. Tr. 775-77. He also stated that Plaintiff's condition had worsened. Pl. Ex. 99.

Mazek found this response to be inadequate. Tr. 776-77. As a result, in February 1997, with Plaintiff's permission, Mazek spoke to Kamin for clarification of the December 17, 1996 letter; among other things, he wished to learn if Plaintiff was capable of working at home on days she did not teach Tr. 777. Kamin only reiterated his prior general statements regarding Plaintiff's condition. Tr. 777; Pl. Ex. 96.

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Later in February 1997, Dr. Mazek telephoned Plaintiff and asked her to provide him with a list of technologies and approaches that might assist her in performing her duties. Tr. 777-78. Plaintiff agreed to get back to Mazek in one week with a list of requests. Tr. 778; Def. Ex. 89. She never provided such a list. Tr. 779; Def. Ex. 93.

On or about May 1, 1997, Mazek wrote to Plaintiff and again requested that Plaintiff provide the Academy with access to her doctor and to her medical records. Along with his letter, Dr. Mazek included a medical release form for Plaintiff to sign. Tr. 678; Pl. Ex 165. The medical release form provided for Plaintiff's medical records to be released to Academy officials on an "as needed basis," as well as to an Academy-designated physician. Tr. 679. The officials who were to have access to the records were Mazek, the Academy personnel director, the Maritime Administration personnel director and maritime attorneys. Tr. 679.

Plaintiff refused to sign the medical release form. Instead, she complained to the Office of Civil Rights of the Maritime Administration about the request. On or about August 18, 1997, she wrote to Mazek and told him that she was advised by the Office of Civil Rights of the Department of Transportation not to sign the authorization. Tr. 680-81; Pl. Ex. 166.

On October 3, 1997, Mazek wrote to Plaintiff to advise her in writing of the precise terms of the scheduling accommodation the Academy would provide her. Tr. 784; Def. Ex. 126. Specifically, he wrote that the Academy would provide Plaintiff with a three-day teaching schedule, and no classes earlier than 10 a.m. or later than 3 p.m. Tr. 784.

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Plaintiff's Performance Ratings and Efforts to Be Promoted

At the time that the Academy awarded Plaintiff tenure, her evaluation described her "great professional competence" and "welcome personal attributes." Pl. Ex. 15, 16. In the professional judgment of her supervisors and colleagues, Plaintiff was a "first rate" teacher with an "established" record of scholarship, and "an active, intelligent and constructive member of the faculty." Tr. 560-77; Pl. Ex. 15, 16, 19, 23, 25, 26, 28. Immediately following the grant of tenure, the Plaintiff continued to receive positive performance appraisals. The Dean and Brickman, then Department Head, rated Plaintiff's performance with accommodation "Exceptional" in AY's 1993-94, 1994-95 and 1995-96. Pl. Ex. 54, 56, 58, 62, 63, 64, 65, 66. Further, Plaintiff's teaching and scholarship were rated at the highest performance level of "Outstanding" for some years. Pl. Ex. 53, 57. However, as time progressed, the Plaintiff's performance appraisals became less positive and the Plaintiff was unable to proceed successfully to promotion.

During her tenure at the Academy, Plaintiff repeatedly sought promotion to Full Professor. Applications for promotion are initially reviewed by the Faculty Promotion Committee. Tr. 445. After the committee considers an applicant's documents, it interviews the candidate, and makes a recommendation to the Academic Dean. Tr. 445, 119-20. The committee considers five criteria or factors in evaluating a candidate — professional competence, scholarship, teaching, institutional service and personal attributes ("collegiality"). Tr. 120; Def. Ex. 37.

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Plaintiff first applied to be a Full Professor in 1993, a few months after she had received tenure. Tr. 607; Def. Ex. 19. In order to be promoted to Full Professor, a tenured professor at the Academy ordinarily is required to have taught at the Academy for six full years. Tr. 607, 731. At the time she applied for promotion to Full Professor in 1993, Plaintiff did not satisfy this requirement, having taught at the Academy for five and three-quarter years. Tr. 607-08, 731-32; Def. Ex. 19. Plaintiff applied for a waiver of the six-year requirement. Tr. 607-08, 732 The sole criterion for granting a waiver is that failure to grant the waiver would act to the disadvantage to the Academy. Tr. 608, 732. Plaintiff asserted that she should receive the waiver in recognition of her superior performance and to recognize the importance of the Americans with Disabilities Act. Tr. 733; Def. Ex. 20. Donovan and Mazek recommended against granting the waiver because denying Plaintiff the waiver did not act to the disadvantage of the Academy. Tr. 734; Def. Ex. 23.

The next year, 1994, Plaintiff insisted that she was eligible for promotion to Full Professor without having to reapply. Tr. 738-39; Def. Ex. 38. This was inaccurate. Tr. 738-39.

Beginning in 1994, the head of the department, Brickman, prepared a "Progress Towards Promotion" memorandum for each professor eligible for promotion in a given academic year. Tr. 441-42. She also prepared an evaluation form called a "Bingo Sheet." Tr. 447-48. *See also e.g.*, Pl. Ex. 53.[2]

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2. The bingo sheet contained five ranking categories: Outstanding, Exceptional, Fully Successful, Partially Successful and,

(Cont'd)

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In 1994, Plaintiff's progress towards promotion was good. Brickman wrote that Plaintiff's service records had been good based on her coaching of the debate team. However, she noted that, because the debate team was in decline, Plaintiff needed to find other sources of service. Tr. 447-48; Def. Ex. 75.

In 1995, Brickman noted that Plaintiff was a strong teacher, but remained weak in performing service. Tr. 451. This was in large part because Plaintiff made substantial misrepresentations in her draft report for the Academy's Middle States committee. Tr. 451-55; Def. Ex. 75. Plaintiff also was rated less than exceptional for her collegiality, due to her attempts to monopolize the floor at Faculty Forum meetings. Tr. 460-61.

In 1996, Brickman rated Plaintiff's service to be inadequate in her Progress Toward Promotion memorandum. Tr. 462; Pl. Ex. 100. She did so due to Plaintiff's poor participation in the department's *ad hoc* curriculum committee and her minimal service outside of the Department. Tr. 464. Plaintiff was rated only fully successful for her service and collegiality that year on the Bingo Sheet, due to the tensions which existed in the *ad hoc* curriculum committee. Tr. 464, 467; Pl. Ex. 57.

(Cont'd)

finally, Unsuccessful. Although the Plaintiff received many ratings in the Exceptional and even Outstanding categories she also received many and, as time progressed, increasing numbers, of rankings in the lower category Fully Successful.

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In AY 1996-97, Brickman rated Plaintiff only fully successful for service and collegiality. Pl. Ex. 59. Plaintiff had been on leave for three terms, and returned to significant conflict in March 1997, regarding the size of her assigned class. Tr. 470-71. Moreover, Plaintiff was not maintaining proper office hours. Tr. 474.

Plaintiff again applied for promotion in the fall of 1997. Brickman assessed Plaintiff as less than qualified for promotion in the areas of service and personal attributes. Tr. 472-73. She rated Plaintiff's service as low because, as head of the Library Committee, Plaintiff had a chance to make a "splash." Instead, Plaintiff did nothing — the committee never even met. Tr. 473. Moreover, Plaintiff had excessive absences and continued to fail to maintain proper office hours. Tr. 474.

However, on December 5, 1997, Brickman wrote to the head of the Faculty Personnel Committee and asked for additional time to prepare a full assessment of Plaintiff's work. Brickman explained that she had observed Plaintiff for only a limited number of weeks during the prior period because the Plaintiff had been on leave and/or sabbatical for the prior three terms. Brickman wrote that if Plaintiff maintained her level of service and improved her collegiality, she would be in a position to recommend Plaintiff for promotion; otherwise, she would have to recommend against promotion. The extension was granted. Tr. 477-78, 743-44; Def. Ex. 128. Defendant objected, asserting that Brickman was delaying her promotion. Tr. 944.

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In 1998, the Faculty Personnel Committee rejected Plaintiff's application for promotion, stating that it was "unimpressed with Delson's record of institutional service" and because "she is not collegial, is excessively guided by self-interest and at times is disruptive to the good order of the Humanities Department and the Academy at large." Def. Ex. 171.

Conflicts in 1998-99 Culminating in Termination

A *The New Schedule and the Creation of Slash Courses*

As of July 1998, the Academy reformulated its entire academic structure. The Academy's academic year was broken into three thirteen week trimesters, rather than four ten week quarters. Class periods were changed to 60 minutes instead of 50 minutes. In addition, incoming first-year (freshman) students' schedules and curricula would be different than those for existing students. Tr. 112-13, 806. This reformulation was the end result of a process which began in 1996. That year, Middle States, the accrediting body for colleges in the region, recommended calendar reform to reduce the hectic pace of classes at the Academy. Tr. 109-10. As a result, the Academy's Superintendent formed the Academic Calendar Action Group to investigate possible restructuring of the Academy's curriculum and calendar. Tr. 109. The chair of the committee was Charles Weber, a mathematics professor. Tr. 109. That committee recommended the transition to a trimester system. Tr. 111-12.

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The Superintendent then formed two committees in AY 1997-98 to determine how to implement the change to a trimester system. Tr. 52-53, 686. Among the committees' tasks was to create new curriculum matrices. Curriculum matrices specify which courses incoming students in the various majors would be assigned each term under the new calendar. Tr. 55-56. In addition, "transition matrices" had to be created, setting forth the classes each term that existing students (who entered the Academy before July 1998) would take under the trimester system while taking old "quarter" courses. Tr. 56; Pl. Ex. 70A-E, 71.

Because there was one term less per year, upperclass midshipmen who had started under the quarter system were required to take more classes each term, compressing into three terms courses that had been spread over four quarters. Tr. 113-14. Rather than require upperclass students to take additional courses simultaneously, the Academy created "slash" courses. Slash courses were full term courses taught over half a term. Thus, rather than assigning students two additional classes two times per week for the entire trimester, slash courses met four times per week for half the term. After approximately seven weeks, students would complete one of the two classes, and then commence the other. Tr. 114, 687. Each "slash course" compressed a standard 13 week course syllabus into 6.5 weeks so that professors would have to convey the same required information and give the same exams and papers in a shorter interval of time. The "pace" of "slash" courses was "faster" for this reason, and also "more intense." Tr. 131-32. It was Dr. Weber who decided which classes would be slashed. Tr. 115. He slashed those courses it made sense to put together — courses with similar subjects. Tr. 115-16.

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In the first term of AY 1998-99, in the Humanities Department, the two Comparative Culture classes and History 1 and History 2 were among the classes designated to be slashed. Tr. 116. Plaintiff generally taught Comparative Culture and both History 1 and 2 at various times. Accordingly, in the first term of AY 1998-99, Plaintiff was projected to teach two slash courses for eight hours per week, in the first trimester. Tr. 281, 687-88. Plaintiff objected to her assignment, asserting that it gave her an unfairly large credit load to teach. Tr. 486. She also objected because the assignment required her to teach four days per week. Tr. 1045, 486. Upon realizing that her schedule would not be modified, the Plaintiff requested a leave of absence for the term. Tr. 688.

The following Academic Year, AY 1999-2000, first term, some, but not all, courses which had been designated slash courses, including Comparative Culture, were "unslashed." Tr. 118. This was done in large part because of complaints received from the students regarding the slash courses. Tr. 118. Students had concerns about when papers were due and complained that there should have been better coordination between the teachers of slash courses and teachers of other classes. Tr. 94.

B *Request for Medical Documents*

In response to Plaintiff's objections, the Academy informed Plaintiff that it would provide her with leave without pay for the first trimester if she provided the Academy with the long sought-after medical records. Tr. 688-89, 701. Mazek wrote to Plaintiff on May 15, 1998, to request again

that Plaintiff produce her medical records in June 1998. Plaintiff did not meet that deadline. Tr. 790. On June 9, 1998, Mazek wrote to Plaintiff again, reiterating his request for medical documentation. Tr. 791.

Plaintiff provided the Academy with an additional letter from Kamin dated July 22, 1998. Tr. 689; Pl. Ex. 142. However, the Academy did not consider this letter adequate because it simply reiterated the information already related in Kamin's previous letters. Tr. 1085-87. Dr. Delson refused to provide the Academy, or its designated medical evaluator, with medical information to supplement Kamin's letters. Tr. 689.

In July 1998, the Academy sent Kamin's September 8, 1993 and December 17, 1996 letters to Dr. Neil Presant, an occupational specialist with the United States Public Health Service ("Presant"). Tr. 796; Pl. Ex. 38 and 99. On or about August 18, 1998, Presant wrote to the Academy personnel officer, Thomas Goodwin. Presant informed Mr. Goodwin that the information provided was too dated and not sufficiently detailed to make a valid assessment of the Plaintiff's ability to perform her duties. Def. Ex. 187.

On July 27, 1998, Plaintiff formally applied for Leave Without Pay ("LWOP") for the first trimester of AY 1998-99. Tr. 793; Def. Ex. 182. In her application for leave, the reasons that she gave for requesting leave was that "my disability prevents me from doing the academic workload as scheduled for me for the fall trimester without the reasonable accommodation of a three-day on campus presence which I have had since 1993." Tr. 1045; Def. Ex. 182. Mazek granted

Plaintiff LWOP for that term, contingent upon her providing her medical records by August 14, 1998. Tr. 793-95, 1045-46. Mazek wrote to Plaintiff that if she did not want to send her medical records to the Academy, she could send them directly to Presant. Tr. 1099; Def. Ex. 185.

Plaintiff did not release her medical records to the Academy or to Presant as requested. Tr. 795. Mazek extended again the deadline to do so until August 31, 1998. Tr. 795. He informed Plaintiff that if she did not provide the required medical records, he would revoke his consent to her LWOP and would consider her Absent Without Leave ("AWOL"). Tr. 1095; Def. Ex. 185. Plaintiff did not meet that deadline. Tr. 795-96, 1098. Accordingly, on September 8, 1998, Plaintiff was designated AWOL. Tr. 701; Def. Ex. 189. The letter to Plaintiff from Mazek also warned Plaintiff that if she did not return to work by September 15, 1998, additional disciplinary action would be contemplated. Def. Ex. 189. Plaintiff did not return to work on September 14, 1998. Tr. 1101.

On or about November 9, 1998, Mazek sent to Plaintiff a letter of proposed removal. Tr. 802; Def. Ex. 203. The decision was based upon Plaintiff's refusal to provide proper medical information to the Academy to be able to determine what she could do under the new trimester system, as well as Plaintiff's claim that she was medically unable to teach the classes assigned to her. Tr. 714, 803-04.

In December 1998, Admiral Joseph Stewart, the new Superintendent of the Academy, telephoned Plaintiff and asked her to give the Academy access to her medical records.

Plaintiff again refused. Tr. 888. Plaintiff was dismissed as of January 15, 1999. Tr. 713-14; Pl. Ex. 135.

Plaintiff's EEO Complaints

In August 1997, Plaintiff filed a formal written EEO agency complaint based on the assignment of an over enrolled class and denial of professional advancement opportunities. Tr. 685-86, 274-77.

In January 1998, Plaintiff filed a formal written EEO agency complaint based on threats of possible campus assignments on non-teaching days. Pl. Ex. 151.

On May 5, 1998, Plaintiff filed a written EEO agency complaint based on the alleged rescission of a reasonable accommodation that called for a teaching schedule that ended no later than 2 p.m. on Friday afternoons. Pl. Ex. 129.

On July 14, 1998, Plaintiff filed an addendum to her May 5, 1998 EEO agency complaint based on the assignment of a four day teaching schedule and the alleged withdrawal of the longstanding accommodation of a modified teaching schedule. Pl. Ex. 131.

On December 21, 1998, Plaintiff filed an EEO agency complaint based on revocation of leave of absence, suspension, and proposed termination. Pl. Ex. 146.

On February 6, 1999, Plaintiff filed an EEO agency complaint based on the termination of her employment. Pl. Ex. 147.

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CONCLUSIONS OF LAW

In this civil action, the Plaintiff bears the burden of proving, by a preponderance of the evidence, each of the elements of the alleged causes of action. *See Herman & Maclean v. Huddleston*, 459 U.S. 375, 387-88, 103 S. Ct. 683, 690, 74 L. Ed. 2d 548, 559 (1983). In light of the facts and evidence presented and the applicable burden of proof, the following constitute the Court's conclusions of law.

I *Discriminatory Failure to Accommodate*

The Plaintiff alleges that she was discriminated against, by reason of her disability, in violation of the Rehabilitation Act, in various ways. The Plaintiff's principle complaint is that in 1998 she was denied the requested accommodation of a three-day work week and/or an unpaid leave of absence. As a result, Plaintiff alleges, she was suspended and ultimately terminated.

" [U] nder the . . . Rehabilitation Act, a plaintiff can state a claim for discrimination based upon her employer's failure to accommodate her handicap by alleging facts showing (1) that the employer is subject to the statute under which the claim is brought, (2) that she is an individual with a disability within the meaning of the statute in question, (3) that, with or without reasonable accommodation, she could perform the essential functions of the job, and (4) that the employer had notice of the plaintiff's disability and failed to provide such accommodation." *Lyons v. Legal Aid Society*, 68 F.3d 1512, 1515 (2d Cir. 1995).

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There is no dispute that the Defendant receives federal financial assistance and, therefore, is subject to the requirements of the Rehabilitation Act. There is also no dispute that the Plaintiff is disabled within the meaning of the statute. *See* Def. Proposed Findings of Fact and Conclusions of Law p. 26. At issue in this case is the Plaintiff's allegation that, had the Defendant provided her with the reasonable accommodation of either a three-day work schedule or an unpaid leave of absence, she would have been able to perform the essential functions of her position and, therefore, Defendant's failure to provide said accommodation was a discriminatory action.

The Rehabilitation Act does not include a definition of reasonable accommodation. The term is to be interpreted in accordance with the Americans With Disabilities Act ("ADA") and the EEOC regulations promulgated under both the Rehabilitation Act and the ADA. *See Lyons*, 68 F.3d at 1515. The ADA provides that "the term 'reasonable accommodation' may include . . . part-time or modified work schedules." 42 U.S.C. § 12111(9). Further, the EEOC regulations provide that an employer has a duty to provide accommodations "that enable a qualified individual with a disability to perform the essential functions of that position. . . ." 29 C.F.R. § 1630.2. It is not, however, discriminatory to fail to provide an accommodation if the employer "can demonstrate that the accommodation would impose an undue hardship on the operation of [its] business." 42 U.S.C. § 12112(b)(5)(A). Further, "'reasonable accommodation' does not mean elimination of any of the

job's essential functions," *Gilbert v. Frank*, 949 F.2d 637, 644 (2d Cir. 1991), and there is no requirement that "the employer . . . provide every accommodation the disabled employee may request. . . ." *Fink v. New York City Dep't of Personnel*, 53 F.3d 565, 567 (2d Cir. 1995). "Whether or not something constitutes a reasonable accommodation is necessarily fact-specific. Therefore, determinations on this issue must be made on a case-by-case basis." *Wernick v. Federal Reserve Bank of New York*, 91 F.3d 379, 385 (2d Cir. 1996).

In this case, the Plaintiff asserts that she was entitled to a three-day work week as a reasonable accommodation for her disability. The Court finds that the Plaintiff has failed to prove that a three-day work week constitutes a reasonable accommodation within the meaning of the Rehabilitation Act. First, the Court finds that the Plaintiff, had she been granted the requested accommodation, would not have been able to perform the essential functions of her position. Second, the Court finds that requiring the Academy to grant the requested accommodation would put an undue burden on its operations.

A *Essential Functions*

The evidence produced at trial established that the essential functions of the position of Professor at the Academy were (1) teaching; (2) one office hour per week for each class taught; and (3) participation in extracurricular activities or committees. Tr. 750, 810; Def. Ex. 217. The evidence further established that, beginning in the fall of

1998, with the transition to the trimester system, the schedule at the Academy was as follows:

Period	Time
1	8:00-9:00
2	9:10-10:10
3	10:20-11:20
Lunch	11:30-12:30
4	12:30-1:30
5	1:40-2:40
6	2:45-3:45

Tr. 806; Def. Ex. 252. Applying the Plaintiff's requested accommodation to the Academy's schedule, it is clear that the Plaintiff would be unable to fulfill the essential functions of the position if she were granted the accommodation.

First, the Plaintiff requested that she not be scheduled to teach before 10:00 a.m. Pl. Ex. 29. Granting this request eliminates periods 1 and 2 as potential scheduling times for the Plaintiff. Next, the Plaintiff requested that she not be scheduled to teach after 3:00 p.m. and/or after 2:00 p.m. on Fridays. Pl. Ex. 29. Granting this request eliminates period 6 on all days and periods 5 and 6 on Fridays. This means that Plaintiff would be available to teach only periods 3, 4, and 5 on Monday through Thursday and periods 3 and 4 on Friday. Finally, Plaintiff requests that she only teach three days per week. Pl. Ex. 29. Applying this request, it is clear that, at the very most, the Plaintiff would be available only

9 periods per week.[3] It is simply not possible for the Plaintiff to perform all of the essential functions of the position of Professor in 9 periods per week. Nine periods per week would allow her to teach three courses that met three times per week. This course load may have been acceptable, although, the evidence tends to show that Professors in the Plaintiff's department typically carried a course load of three or four courses. However, even assuming that carrying a three course load would fulfill the teaching function of the Plaintiff's position, she would have no available time to schedule office hours or be available to participate in extracurricular activities or committees. As such, the Plaintiff could not, if granted her requested accommodation, fulfill all of the essential functions of her position.

The Plaintiff makes a conclusory statement that, had she been granted the requested accommodation, she would have been able to perform the essential functions of her position. However, the evidence simply does not support that proposition. First, it is important to note that, prior to the scheduling change, the Plaintiff had a history of failing to adequately perform the functions of office hours and committee responsibilities. Tr. 447, 466-67, 472-74; Def. Ex. 75, 110; Pl. Ex. 57, 59, 100. As such, it is unclear that the

3. Even this schedule is unlikely because it requires that Friday be one of the days that Plaintiff is scheduled to be off campus. The evidence shows that the classes taught by Plaintiff are generally scheduled for Monday, Wednesday and Friday and that, therefore, it is likely that Plaintiff would not be able to be scheduled to be off campus on Fridays. In the event that Plaintiff maintained a schedule providing that her off campus days were Tuesday and Thursday, she would only be available 8 periods per week.

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Plaintiff was truly able to perform all of the essential functions of her position even prior to the scheduling change. Further, although the Plaintiff testified that her requested accommodation of classes between the hours of 10 and 2 only applied to teaching hours and that she would be available to perform other functions of her position outside of those hours, that self serving testimony alone is not enough to satisfy the Plaintiff's burden. Tr. 1116. The Court notes that the evidence considered as a whole indicates that the officials at the Academy did not understand that the Plaintiff was willing to perform any of her job functions outside of the hours of 10 and 2. And, again, the evidence established that the Plaintiff had not been adequately performing those functions prior to the scheduling change and, as such, there is no evidence to support the contention that she would have began to do so after the implementation of the new schedule. Finally, it is important to note that the Academy, unlike other institutions of higher education, has unique scheduling problems that require the needs of the students to drive teaching schedules. Tr. 746-47. As such, even assuming that the Plaintiff could perform her non-teaching duties outside of the hours of 10 and 2, it is highly unlikely that the Academy would be able to schedule the Plaintiff's required 9 class hours within the 9 hours that she is available to teach. Put simply, the Plaintiff's requested accommodation is too restrained to allow her to perform the essential functions of her position within the Academy's new trimester schedule.

The Plaintiff argues, in the alternative, that the Academy could have granted her the reasonable accommodation of an unpaid leave of absence for the Fall 1998 term and that, if granted that accommodation, she would have been able to

return to the Academy the following term and perform the essential functions of her job. Again, the evidence does not support this contention. Had the Academy granted the Plaintiff the unpaid leave for the Fall 1998, it would not have alleviated the scheduling problems discussed above. The Plaintiff's principal complaint at that time was that she was scheduled to teach slash courses and that she was scheduled to teach four days per week and, although that complaint *may* have been alleviated by the granting of an unpaid leave for that term, that accommodation would not have alleviated any of the other scheduling problems discussed above. As such, there is no indication that the granting of an unpaid leave for the Fall 1998 term would have allowed the Plaintiff to perform the essential functions of her position.

B *Undue Burden*

Moreover, even if the Plaintiff would have been able to perform the essential functions of her position if granted the scheduling accommodation that she requested, the Court finds that the schedule would have been an undue burden on the Academy and, as such, does not constitute a reasonable accommodation. Undue burden is an affirmative defense and, as such, the burden of proving it is on the Defendant. *See Stone v. Mount Vernon*, 118 F.3d 92, 98 (2d Cir. 1997). An undue hardship is one that requires significant difficulty or expense when considered in light of various factors, including the nature and cost of the accommodation, the overall resources of the Defendant, the effect of providing the accommodation on the overall resources of the Defendant, and the type of services being offered by the Defendant. *See id.*; *Powell v. Nat'l Bd. of Med. Examiners*, 364 F.3d 79,

88 (2d Cir. 2004); 42 U.S.C. § 12111(10). "In addition, a defendant need not make an accommodation at all if the requested accommodation would fundamentally alter the nature of the service, program or activity." *Powell*, 364 F.3d at 88 (internal quotations omitted).

In this case, the Defendant is an educational institution and, as such, has a responsibility to the needs of its students. Further, the evidence has established that the Academy, unlike more traditional colleges and universities, has unique scheduling requirements for its students and, as such, requires that students needs, and not the preferences of professors, must be considered a priority in scheduling. Tr. 746-47. Given the unique nature of the services provided by the Academy, requiring it to provide a scheduling accommodation as limited and rigid as the one requested by the Plaintiff would impose an undue burden.

The Court finds that the Plaintiff's request for a one term unpaid leave would not, standing alone, have amounted to an undue burden. However, if the Plaintiff had been granted an unpaid leave, it would not, as discussed above, have allowed her to perform all of the essential functions of her position in future terms. As such, in order for the unpaid leave to have been effective, it would have had to be indefinite until such time as either (1) the Plaintiff's availability became more flexible or (2) the Academy's schedule changed in such a way that it allowed the Plaintiff to perform her functions within her requested schedule. Because it is clear that neither of these events was reasonably foreseeable, it is also clear that requiring the Academy to grant such an indefinite unpaid leave would amount to an undue burden.

Appendix B

C *Reasonable Accommodation*

Finally, the Court notes that, although the accommodations requested by Plaintiff were not reasonable, the Defendant did have a duty to provide the Plaintiff with a reasonable accommodation if one had been discovered. However, the Plaintiff has a duty to engage in the process of developing an appropriate accommodation. The evidence produced at trial, and particularly, the Court's observations of the Plaintiff's demeanor while testifying, indicated that the Plaintiff was unrelenting in her demand for the requested accommodation and that she was unwilling to consider alternative accommodations. Tr. 773-75, 1110, 1122. Further, the evidence produced at trial established that the Academy had in fact provided the Plaintiff with various other accommodations, including a parking spot, the right to wear non-regulation shoes, elevator access, an air conditioned classroom, and various scheduling allowances. Tr. 583, 592, 623, 642, 648, 652, 757, 760-62, 1001-03. Given the Academy's apparent willingness to provide the Plaintiff with accommodations within its means, and given the Plaintiff's demonstrated unwillingness to consider other accommodations, the Court finds that the Academy satisfied its Rehabilitation Act obligations to attempt to accommodate the Plaintiff's disability.

For all of these reasons, the Plaintiff has failed to prove her discriminatory failure to accommodate claim and the Defendant is entitled to judgment on that claim.

Appendix B

II *Discriminatory Treatment*

The Plaintiff also asserts that she was subjected to various instances of intentional disability discrimination. Specifically the Defendant alleges that (1) she was required to carry a heavier load than other professors and was not given the same favorable flexibility in scheduling and (2) that she was denied promotion. "We analyze claims of intentional discrimination under . . . the Rehabilitation Act under the familiar *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), burden-shifting analysis established for employment discrimination cases under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*" *Regional Economic Community Action Program, Inc. v. Middletown*, 294 F.3d 35, 48-49 (2d Cir. 2002). The plaintiff bears the initial burden of proving a prima facie case of discrimination. *See McDonnell Douglas*, 411 U.S. at 802. "To establish a prima facie case under the Rehabilitation Act, . . . the plaintiff[] must show that the defendants [took the challenged action] 'solely' because of the disability." *Middletown*, 294 F.3d at 49. If Plaintiff establishes a prima facie case, Defendant must proffer a legitimate, non-discriminatory explanation for the allegedly discriminatory action. Upon doing so, the burden shifts back to the Plaintiff to demonstrate that the proffered explanation is merely a pretext. *See Tomka v. Seiler Corp.*, 66 F.3d 1295, 1308 (2d Cir. 1995).

A *Course Load and Scheduling Flexibility*

The Plaintiff asserts that the Academy's failure to provide her with the schedule that she requested and requirement that

she teach slash courses, were acts taken with a discriminatory motive. Specifically, the Plaintiff asserts that other professors were treated differently and more favorably and that the difference in treatment was a result of disability discrimination. Having reviewed the evidence produced at trial, the Court finds that the Plaintiff has failed to prove that any of the actions taken were taken solely because of her disability and has failed to prove that the Academy's proffered explanations were pretext.

The Plaintiff seeks to prove that the Academy had a discriminatory motive for scheduling her to teach slash courses and to teach four days per week during the fall term of 1998. As evidence of the discriminatory motive, the Plaintiff asserts that other professors' scheduling preferences were accommodated and that other professors weren't asked to carry as rigorous a load that term. Having reviewed the evidence, the Court finds that the Plaintiff failed to meet her burden of establishing disparate treatment. First, the Court notes that, while many of the scheduling preferences of the Plaintiff's colleagues were honored by the Academy, so too were many of the Plaintiff's. Tr. 583, 592, 623, 642, 648, 652, 757, 760-62; Pl. Ex. 29, 36, 163. Further, the Court notes that while some of the Plaintiff's scheduling demands were refused during the fall term of 1998, the evidence also established that scheduling preferences of her colleagues had also been denied when necessary. Tr. 325-33, 493-95; Def. Ex. 234, 251. As such, the evidence does not, as the Plaintiff claims, establish that all of the other professors were granted scheduling flexibility and that she alone was treated differently when her requested schedule was not granted. In fact, the evidence shows that the Academy had a history

of accommodating the scheduling preferences of its professors, including the Plaintiff, when at all possible and denying them when necessitated by the Academy's schedule and/or the needs of the students.

The evidence produced also does not support the Plaintiff's contention that, in the fall term of 1998, she was asked to carry a more rigorous load than her colleagues. In fact, the evidence shows that the Plaintiff was asked to carry a course load nearly identical to, or even lighter than, most of her colleagues. Tr. 487-91; Def. Ex. 234. In the fall term of 1998, the Plaintiff was scheduled to teach four "slash" courses, totaling eight credit hours for the term. This schedule called for her to teach four days per week. Six other professors in the Plaintiff's department carried a teaching load that term. Of the six, all were scheduled to teach four days per week; one of the six was scheduled to teach four "slash" courses, for a total of eight credit hours, identical to the schedule proposed for the Plaintiff; three of the six were scheduled to teach nine credit hours for the term, although none of the courses were "slash" courses; the remaining two were scheduled to teach less credit hours than the Plaintiff for the term, one with five and one with four. It is, therefore, clear that the Plaintiff was not singled out to teach the most rigorous schedule for the term. Tr. 487-91; Def. Ex. 234.

The Plaintiff argues that she was scheduled to teach four courses in the fall term of 1998 and that the other professors in her department had a lighter course load, most only teaching three courses. However, Plaintiff's interpretation of the proposed schedule for the term is misleading. Although the Plaintiff was scheduled to carry four courses throughout

the term, each course only lasted half of the term, as such, the Plaintiff was scheduled to teach no more than two courses at any time. In contrast, the Plaintiff's colleagues scheduled to carry nine credit hours for the semester only taught three courses for the term, but taught all three simultaneously for the entire term. As a result, the professors scheduled to teach three courses would actually teach more hours than the Plaintiff. While the Plaintiff's proposed schedule would be more rigorous in that it would require her to grade papers and/or exams for one extra class, it would have been less rigorous in that she would have had one less teaching hour per week throughout the semester. As such, the Court finds that the Plaintiff failed to establish that the schedule proposed for her was more rigorous than those proposed for her colleagues.

Finally, the Plaintiff alleges that hostile and/or discriminatory remarks made by officials at the Academy are evidence of a discriminatory motive for the scheduling decisions. The Plaintiff alleges that Brickman made various disparaging remarks to her, including invasive questions about certain medications and therapies, questions about whether the Plaintiff suffered from atrophy, and remarks indicating skepticism regarding Plaintiff's need for a handicapped parking permit. Tr. 903-06. Brickman is alleged to have stated to the Plaintiff, "so what if you have some paralysis, so what if you have a problem with your gate [sic.] and you get tired too." Tr. 899. Having reviewed the testimony, and particularly the demeanor of the witnesses, the Court finds that the Plaintiff may tend to exaggerate the persecution that she is alleged to have suffered, however, the Court also finds it likely that Brickman was, at times,

insensitive to the Plaintiff's feelings and perhaps inappropriate in her comments. However, the Court finds that Brickman's insensitivity cannot, alone, satisfy the Plaintiff's burden of establishing that the Academy's employment actions were taken solely by reason of her disability.

Even assuming the Plaintiff had satisfied her burden of establishing her prima facie case of discrimination by showing that the Academy's scheduling decisions in the fall term of 1998 were made because of her disability, the Academy has proffered a legitimate, non-discriminatory explanation for the scheduling decisions which the Plaintiff is unable to refute.

The Academy's decision to reform its academic calendar was the result of a recommendation from Middle States, the accrediting body for colleges in the region. Tr. 109-110. Middle States recommended that the Academy reduce the hectic pace of the Academy's academic system as it existed under the quarter system. In response, the Academy instituted various changes including changing from a quarter calendar to a trimester calendar, extending classes from 50 to 60 minutes and, ultimately, decreasing the number of classes that the Academy's students would take each term. Tr. 109-13. When the trimester calendar was instituted in the fall term of 1998, the Academy needed to address a scheduling problem. Specifically, the upperclass students at the Academy, who had already begun their education under the quarter system, needed to complete the classes required in the quarter system within the new trimester calendar. In order to complete four terms worth of classes in three terms, the

upperclass students were facing the task of taking significantly more courses per term than they had under the quarter system. This alternative was unacceptable to the Academy, as the purpose of the new academic calendar was to decrease the course load of the students and slow the hectic pace of the academic calendar. Tr. 113-14.

In order to accommodate the upperclass students, the Academy instituted "slash" courses. These courses would meet for half of a term, thereby allowing the students to take their classes in three terms instead of four, without requiring them to take any more courses than usual at any given time. Tr. 113-14, 687. In other words, the evidence shows that the Academy instituted the new academic schedule and developed "slash" courses at the recommendation of the accrediting body and for the good of its students. As such, the Defendant has established that the changes were made for a legitimate, non-discriminatory reason. The Plaintiff has offered no evidence to rebut this explanation or to establish that it was a mere pretext for discrimination.

Not all of the courses taught to the upperclass students were taught as "slash" courses. However, History I and History II as well as Comparative Culture, all courses that the Plaintiff taught, were among the courses "slashed." Tr. 116. The Plaintiff claims that this decision was made with a discriminatory purpose. However, the evidence presented established that the decision to "slash" those courses, as well as the other courses slashed, was driven not by discriminatory animus, but by common sense. Classes that consisted of similar subject matter, such as History I and History II and Mathematics I and Mathematics II, were "slashed" and paired

together. The credible testimony established that faculty schedules and assignments were not considered in deciding which courses to "slash," but that the decisions were made in an effort to combine similar courses, because that made sense and provided the most benefit. Tr. 115-16. This constitutes a legitimate, non-discriminatory explanation for the decision to "slash" the courses taught by the Plaintiff and the Plaintiff has failed to rebut the explanation or offer evidence to prove that it was a pretext.

B *Denial of Unpaid Leave*

The Plaintiff further argues that she was discriminated against when the Academy failed to grant her an unpaid leave for the fall term 1998. The Plaintiff asserts that the Academy had a liberal leave policy and that the denial of Plaintiff's requested leave was the result of disability discrimination. Again, the Court finds that the Plaintiff did not prove that the requested leave was denied solely because of her disability. The evidence established that the Plaintiff's leave was denied because she failed to submit requested medical documentation. Tr. 688-89, 701, 790-91, 793-95, 1045-46, 1098; Pl. Ex. 142; Def. Ex. 183, 185, 187, 189. As discussed below, there was nothing improper about the Academy's request that the Plaintiff supply medical documentation to support her need for accommodation. As such, the Plaintiff did not prove that the denial of the unpaid leave was a discriminatory action.

Appendix B

C *Failure to Promote*

Finally, the Plaintiff asserts that the Academy's failure to promote her to the position of Full Professor was discriminatory. In order to be promoted to Full Professor at the Academy, a professor must have six years teaching experience at the Academy. Tr. 607, 731. Upon completion of six years teaching, a professor may seek promotion by applying to the Faculty Personnel Committee. Tr. 445. A letter of recommendation must be written on behalf of a professor seeking promotion by the head of the professor's department. Tr. 119-20. Upon review of the application and the letter of recommendation, the Faculty Personnel Committee makes a recommendation to the Academic Dean. Tr. 119-20, 445. Applicants for promotion are rated in five categories: teaching, scholarship, professional competence, institutional service and personal attributes. Tr. 120, Def. Ex. 37.

Plaintiff first applied for promotion to Full Professor in 1993 and continued to be considered thereafter. Tr. 607; Def. Ex. 19. The Plaintiff was not promoted before her termination in 1998. The Plaintiff alleges that the failure to promote was the result of disability discrimination. However, the Court finds, having reviewed all of the evidence, that the Plaintiff was unable to prove that the failure to promote was solely because of her disability.

In 1993, when the Plaintiff first applied for promotion, she had been teaching at the Academy for 5 3/4 years. Tr. 607-08, 731-32. Because she did not have the 6 years required teaching experience, she applied for a waiver of that

requirement. Tr. 608, 732. Waivers are granted by the Academy only if a failure to grant the waiver would act to the disadvantage of the Academy. Tr. 608, 732. Dr. Donovan and Dean Mazek recommended against waiver, as there was no evidence that denying the waiver would act to the detriment of the Academy. Tr. 734; Def. Ex. 23. This constitutes a legitimate, non-discriminatory explanation for the failure to promote in 1993 and the Plaintiff has offered no evidence that she was entitled to a waiver, that the policy was arbitrarily applied against her, or that the explanation is otherwise a pretext.

Thereafter, Plaintiff was not granted a promotion because the Faculty Personal Committee and/or her Department Head refused to recommend her. The Plaintiff asserts that these refusals to promote were discriminatory; the Defendant asserts that the Plaintiff was found lacking in the categories of institutional service and personal attributes and that these shortcomings were the cause of the failure to promote. Having reviewed the evidence, the Court finds that the Defendant has properly established a legitimate, non-discriminatory reason for the failure to promote and that the Plaintiff has not met her burden of rebutting the proffered explanation and proving that the action was discriminatory. The evidence established that the Plaintiff had a history of displaying an argumentative attitude and interacting with her colleagues in an unprofessional manner. Further, the evidence established that the Plaintiff failed to make any significant contribution to the Academy by way of institutional service through committees or extracurricular activities and that she failed to maintain proper office hours. Tr. 447-48, 451-55,

460-61, 462, 464, 467, 470-73; Def. Ex. 75, 171, 110; Pl. Ex. 57, 59, 100. As such, the Plaintiff has failed to meet her burden of proof on this claim.

III *Confidentiality of and Request for Plaintiff's Medical Records*

The Plaintiff asserts various claims related to Dean Mazek's May 15, 1998 letter to the Plaintiff requesting that she release certain medical information. The Plaintiff asserts that the letter (1) violates the statute's prohibition against medical inquiries; (2) violates the statute's limitations restricting access to medical information; (3) violates the statute's requirement that the Defendant engage in good faith in an interactive process with a disabled employee; (4) constitutes a discriminatory employment practice; and (5) constitutes retaliation.

A *Discriminatory or Retaliatory Act*

First, the Court finds that the Plaintiff has failed to prove that the letter was written with either a discriminatory or a retaliatory motive. The evidence clearly established that Dean Mazek wrote the letter in an effort to verify the Plaintiff's need for an accommodation that she requested. Tr. 700-01. Further, the evidence established that the Academy had a history of providing the Plaintiff with accommodations where practicable and that, therefore, there is no basis for inferring that the Dean's inquiries were made with any discriminatory or retaliatory intent. Tr. 583, 592, 623, 642, 648, 652, 757, 760-62, 873, 1001-03; Pl. Ex. 29, 36, 163. Although the Plaintiff contends that the inquiry constituted a sudden

departure from a longstanding policy of freely granting the requested accommodations, the evidence presented at trial does not support her position. First, the evidence showed that there existed a fundamental misunderstanding between the parties, in that the Plaintiff and the officials at the Academy had divergent understandings of the parameters of the accommodations granted Plaintiff. Tr. 357-58, 760-61, 1010-14, 1017; Def. Ex. 55, 56; Pl. Ex. 110, 163. Further, the evidence showed that there had been a change in circumstances, in that the Academy's scheduling needs had changed. Tr. 109-13. Because of this changed circumstance, the Academy was no longer able to freely grant the Plaintiff's requested accommodations. In fact, it is not clear that the Academy would have been able to grant the accommodation as requested even if the Plaintiff's need had been documented. It is, however, clear that the changed circumstances necessitated that the Plaintiff document her need for accommodations which were no longer easily granted. In short, the Plaintiff failed to prove that the letter was written with a discriminatory or retaliatory motive.

B *Failure to Engage in the Interactive Process*

The Court further finds that the Plaintiff failed to prove that the letter represented a failure, by the Academy, to engage in the interactive process and attempt to accommodate the Plaintiff. "The ADA envisions an 'interactive process' by which employers and employees work together to assess whether an employee's disability can be reasonably accommodated." *Jackan v. New York State Dep't of Labor*, 205 F.3d 562, 566 (2d Cir. 2000). An employer should initiate an informal interactive process in an effort to identify a

reasonable accommodation, *see* 29 C.F.R. Pt. 1630, App. § 1630.2(o) (3), and this can include making relevant medical inquiries, *see* 29 C.F.R. § 1630.14(c). In this case, the evidence shows that the Academy did in fact attempt to engage in an interactive process with the Plaintiff in order to establish a reasonable accommodation. In fact, the Academy attempted to initiate the process with a request for medical information. Tr. 688-89, 701. Having reviewed all of the evidence, the Court finds that the Academy did in fact attempt to engage in the required interactive process and that it was the Plaintiff, in refusing to provide the Academy with medical documentation or to attempt to compromise on any of her scheduling demands, who failed to engage in the required process.

C *Prohibition Against Inquiries and Confidentiality*

Finally, the Court finds that the letter did not violate the statute's prohibition against medical inquiries or the statute's requirement that medical records be kept confidential. The disability statutes prohibit inquiries "as to the nature or severity of [a] disability." 42 U.S.C. § 12112(d) (4) (A) . Clearly, the challenged letter constitutes such an inquiry. However, the statute contains express exceptions to the prohibition against medical inquiries and this letter falls within those exceptions. Medical inquiries are specifically permitted as "necessary to the reasonable accommodation process. " 29 C.F.R. Pt. 1630, App. § 1630.14(c). Further, medical inquiries are permitted where they relate to the ability of the employee to perform job-related functions. *See* 42 U.S.C. § 12112(d) (4) (B). Finally, medical inquiries are acceptable to the extent they are "job-related and consistent with business necessity." 42 U.S.C. § 12112(d) (4)(A).

The evidence established that the inquiry made in the Dean's letter falls within these exceptions. First, the inquiry is clearly related, and necessary to, the accommodation process. The Academy had a legitimate need to verify the Plaintiff's need for accommodation and the scope of that need, particularly given the fact that it had become impractical, and potentially impossible, for the Academy to continue freely granting the Plaintiff's scheduling requests. Further, case law shows that "courts will readily find a business necessity if an employer can demonstrate that a medical examination or inquiry is necessary to determine whether the employee can perform job-related duties when the employer can identify legitimate, non-discriminatory reasons to doubt the employee's capacity to perform his or her duties. . . . *Conroy v. New York State Dep't of Corr. Servs.*, 333 F.3d 88, 98 (2d Cir. 2003). In this case, the Plaintiff had requested accommodation, asserting that she could not perform the functions of her job if the accommodation was not granted. This constitutes a legitimate, non-discriminatory reason to question her ability to perform her duties and, as such, establishes the Academy's right to make the medical inquiry. For these reasons, the Court finds that the Dean's letter did not violate the statute's prohibition against medical inquiries.

The Plaintiff further asserts that the Academy violated, or would violate, the statute's requirement that medical records be kept confidential. However, the evidence established that the Academy had repeatedly assured Plaintiff that her medical records would be kept confidential and that only those with a need to know would have access. Tr. 658, 679, 691-92;

Pl. Ex. 143. Further, the medical release sent to the Plaintiff specifically provided that the records would be available to Academy officials only on an "as needed basis." Tr. 679. Finally, the evidence showed that the limited medical information that the Plaintiff had provided the Academy was kept in a locked cabinet in the office of the Department Head. Tr. 367-68. As such, the Court finds that the Plaintiff failed to prove that the Academy violated the statute's requirement that medical records be kept confidential or that her failure to turn over requested documents was justified by a substantial risk that the Academy would violate the confidentiality provision.

IV *Retaliation*

Finally, the Plaintiff states a claim for retaliation, in violation of the Rehabilitation Act, citing to many of the employment actions already discussed herein, including: (1) her termination; (2) the refusal to grant unpaid leave; (3) failing to grant her requested scheduling accommodation, specifically scheduling her to teach "slash" courses and to teach four days per week; (4) failure to promote her; (5) violation of her right to privacy of medical records and information; and, (6) treating her less favorably than other professors. As discussed more fully above, the Court has considered the evidence presented and has determined that the Academy had a legitimate business reason for taking all of these actions. The Plaintiff has failed to prove that any actions were taken with a retaliatory motive and, as such, this claim also must fail.

Appendix B

CONCLUSION

Having found no basis for liability, it is unnecessary for the Court to address the propriety of the Plaintiff's requested damages.

For the reasons set forth herein, the Court dismisses the claims and directs the Clerk of the Court to enter judgment in favor of the Defendant.

Dated: Central Islip, New York
June 9, 2004

SO ORDERED

s/ Joanna Seybert
Joanna Seybert, U.S.D.J.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED MAY 5, 2006

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Roseann B. MacKechnie
CLERK

Date:	5/5/06
Docket Number:	04-4118-cv
Short Title:	Delson v. Slater
DC Docket Number:	99-cv-4723
DC:	EDNY (CENTRAL ISLIP)
DC Judge:	Honorable Joanna Seybert

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 5th day of May two thousand six.

Appendix C

Roberta M. Delson,

Plaintiff-Appellant,

v

Norman Mineta, in his capacity as Secretary of the United States Department of Transportation,

Defendant-Appellee.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Roberta M. Delson. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Roseeann B. MacKechnie, Clerk

By: s/ Tracy W. Young
Motion Staff Attorney

APPENDIX D — STATUTES AND REGULATIONS INVOLVED

The Rehabilitation Act

Title 29 United States Code, Secion 791(g)

Standards used in determining violation of section

> The standards used to determine whether this section has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

Title 42 United States Code, Section 12112(d)

* * *

(2) Preemployment

(A) Prohibited examination or inquiry

> Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

Appendix D

(B) Acceptable Inquiry

A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) Employment entrance examination

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination. If –

(A) all entering employees are subjected to such an examination regardless of disability.

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical records, except that –

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability relevant information on request; and

(iii) government officials investigation compliance with this chapter shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this subchapter.

(4) Examination and Inquiry

(A) Prohibited examinations and inquiries

A covered entity shall not require a medical examination and shall not make inquiries of an employer as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries

A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) Requirement

Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3)

Appendix D

The Americans with Disabilities Act

Title 42 of the United States Code, Section. § 12116

Regulations - Not later than 1 year after July 26, 1990, the Commission shall issue regulations in an accessible format to carry out this subchapter in accordance with subchapter II of chapter 5 of Title 5.

Title 29 of Code of Federal Regulations, Section 1614.203

(a) Model employer. The Federal Government shall be a model employer of individuals with disabilities. Agencies shall give full consideration to the hiring, placement, and advancement of qualified individuals with disabilities.

(b) DA standards. The standards used to determine whether section 501 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 791), has been violated in a complaint alleging nonaffirmative action employment discrimination under this part shall be the standards applied under Titles I and V (sections 501 through 504 and 510) of the Americans with Disabilities Act of 1990, as amended (42 U.S.C. 12101, 12111, 12201), as such sections relate to employment. These standards are set forth in the Commission's ADA regulations at 29 CFR part 1630.

Appendix D

Title 29 of Code of Federal Regulations, Section 1630.14

Medical examinations and inquiries specifically permitted.

(a) Acceptable pre-employment inquiry. A covered entity may make pre-employment inquiries into the ability of an applicant to perform job-related functions, and/or may ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions.

(b) Employment entrance examination. A covered entity may require a medical examination (and/or inquiry) after making an offer of employment to a job applicant and before the applicant begins his or her employment duties, and may condition an offer of employment on the results of such examination (and/or inquiry), if all entering employees in the same job category are subjected to such an examination (and/or inquiry) regardless of disability.

(1) Information obtained under paragraph (b) of this section regarding the medical condition or history of the applicant shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record, except that:

(i) Supervisors and managers may be informed regarding necessary restrictions

on the work or duties of the employee and necessary accommodations;

(ii) First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) Government officials investigating compliance with this part shall be provided relevant information on request.

(2) The results of such examination shall not be used for any purpose inconsistent with this part.

(3) Medical examinations conducted in accordance with this section do not have to be job-related and consistent with business necessity. However, if certain criteria are used to screen out an employee or employees with disabilities as a result of such an examination or inquiry, the exclusionary criteria must be job-related and consistent with business necessity, and performance of the essential job functions cannot be accomplished with reasonable accommodation as required in this part. (See § 1630.15(b) Defenses to charges of discriminatory application of selection criteria.)

(c) Examination of employees. A covered entity may require a medical examination (and/or inquiry) of

an employee that is job-related and consistent with business necessity. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(1) Information obtained under paragraph (c) of this section regarding the medical condition or history of any employee shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record, except that:

(i) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) Government officials investigating compliance with this part shall be provided relevant information on request.

(2) Information obtained under paragraph (c) of this section regarding the medical condition or history of any employee shall not be used for any purpose inconsistent with this part.

(d) Other acceptable examinations and inquiries. A covered entity may conduct voluntary medical

examinations and activities, including voluntary medical histories, which are part of an employee health program available to employees at the work site.

(1) Information obtained under paragraph (d) of this section regarding the medical condition or history of any employee shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record, except that:

(i) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) Government officials investigating compliance with this part shall be provided relevant information on request.

(2) Information obtained under paragraph (d) of this section regarding the medical condition or history of any employee shall not be used for any purpose inconsistent with this part.